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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 2, 1951.

CERTIORARI GRANTED OCTOBER 15, 1951.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 26, 1951.

8001

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Docket Entries

Cr. 330-49

10-5-49. Indictment for unlawful transportation of a dangerous article, carbon bisulphide, in interstate commerce filed 10-4-49.

10-5-49. Notice of Allocation filed. (Newark.)

10-11-49. Notice of Appearance filed.

11-7-49. Motion to dismiss indictment and acknowledgment of service filed 11-4-49.

11-15-49. Notice of motion to dismiss indictment returnable Dec. 2, 1949 and acknowledgment of service filed 11-14-49.

12-5-49. Hearing on motion to dismiss indictment. Decision reserved. (Smith.)

6-16-50. Opinion filed 6-15-50. (Smith.) (Counts 1, 3 and 5 dismissed.)

11-22-50. Order dismissing counts 1, 3 and 5 filed 11-21-50. (Smith.)

11-22-50. Notice of Appeal filed.

11-22-50. Copies of notice of appeal mailed to Joseph C. Glavin and Clerk, U. S. C. A.

[fol. 2] In United States District Court, District of New Jersey

Indictment

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

Count One

That on or about the 13th day of May, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a com-

mon carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 80 drums of carbon bisulphide, an inflammable liquid, having a total gross weight of 48,536 pounds, did unlawfully and knowingly cause Edmund Tyndall to drive and operate said motor vehicle containing said shipment of carbon bisulphide into the Holland Tunnel, a congested thoroughfare at Jersey City, aforesaid, in the course of shipment in Interstate Commerce aforesaid, without said motor vehicle bearing any marks or signs on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid, in which said Holland Tunnel, said 80 drums of carbon bisulphide flamed and exploded;

[fol. 3]

The Grand Jury further charges:

That there were other available and more practicable routes for the transportation of said shipment, and that the defendant well knew that the transportation of the shipment of carbon bisulphide, as aforesaid, into the said Holland Tunnel was in violation of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle; as a result of which violation, bodily injuries were caused to approximately 60 persons. (Title 18 U. S. C. Sec. 835; 49 C. F. R. Cum. Supp., Sec. 197.1(b)).

Count Two

The Grand Jury further charges:

That on or about the 13th day of May, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon

bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute [fol. 4] to Brooklyn, New York, a certain motor vehicle containing a shipment of 2500 pounds and more of carbon bisulphide, an inflammable liquid, to wit: 48,536 pounds of carbon bisulphide, did unlawfully and knowingly operate and cause to be operated said motor vehicle containing said shipment of carbon bisulphide, on and over the public roadways at Jersey City, New Jersey, enroute to Brooklyn, New York, in the course of shipment in interstate commerce, as aforesaid, without said motor vehicle bearing any marks, signs or placards on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid in violation of the provisions of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicles. (Title 18 U. S. C. Sec. 835; 49 C. F. R., 1947 Supp. 71-85 Part 7, 823(a), Page 7025.)

Count Three

The Grand Jury further charges:

That on or about the 7th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade [fol. 5] Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 58 drums of carbon bisulphide, an inflammable liquid, having a total gross weight of 36,687 pounds, did unlawfully and knowingly cause Michael Amato

to drive and operate said motor vehicle containing said shipment of carbon bisulphide into the Holland Tunnel, a congested thoroughfare at Jersey City, aforesaid, in the course of shipment in interstate commerce aforesaid, without said motor vehicle bearing any marks or signs on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid.

The Grand Jury further charges:

That there were other available and more practicable routes for the transportation of said shipment, and that the defendant well knew that the transportation of the shipment of carbon bisulphide, as aforesaid, into the said Holland Tunnel was in violation of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. Cum. Supp., Section 197.1(b).)

Count Four

The Grand Jury further charges:

That on or about the 7th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon [fol. 6] bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 2500 pounds and more of carbon bisulphide, an inflammable liquid, to wit, 58 drums of carbon bisulphide having a total gross weight of 36,687 pounds, did unlawfully and knowingly operate and cause to be operated said motor vehicle containing said shipment of carbon bisulphide, on and over the public roadways at Jersey City, New Jersey, enroute to Brooklyn, New York, in the course of shipment in interstate commerce, as aforesaid, without

said motor vehicle bearing any marks, signs or placards on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid in violation of the provisions of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. 1947 Supp. 71-85 Part 7, 823(a), Page 7025.)

Count Five

The Grand Jury further charges:

That on or about the 8th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a com- [fol. 7] mon carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 22 drums of carbon bisulphide, an inflammable liquid, having a total gross weight of 13,904 pounds, did unlawfully and knowingly cause George Jester to drive and operate said motor vehicle containing said shipment of carbon bisulphide into the Holland Tunnel, a congested thoroughfare at Jersey City, aforesaid, in the course of shipment in interstate commerce aforesaid, without said motor vehicle bearing any marks or signs on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid.

The Grand Jury further charges:

That there were other available and more practicable routes for the transportation of said shipment, and that the defendant well knew that the transportation of the shipment of carbon bisulphide, as aforesaid, into the said Holland Tunnel was in violation of the regulations promulgated and published by the Interstate Commerce Commis-

sion relating to the transportation of explosives and other dangerous articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. Cum Supp. Section 197.1(b).)

[fol. 8] Count Six

The Grand Jury further charges:

That on or about the 8th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 2500 pounds and more of carbon bisulphide, an inflammable liquid, to wit, 22 drums of carbon bisulphide, having a total gross weight of 13,904 pounds, did unlawfully and knowingly operate and cause to be operated said motor vehicle containing said shipment of carbon bisulphide, on and over the public roadways at Jersey City, New Jersey, enroute to Brooklyn, New York, in the course of shipment in interstate commerce, as aforesaid, without said motor vehicle bearing any marks, signs or placards on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid in violation of the provisions of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous [fol. 9] articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. 1947 Supp. 71-85 Part 7, 823(a), Page 7025.)

(S.) Alfred E. Modarelli, United States Attorney.

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

OPINION

SMITH, District Judge:

The indictment in this case contains six counts, each of which charges the defendant with a violation of certain of the regulations promulgated by the Interstate Commerce Commission pursuant to Section 835 of Title 18, United States Code. The defendant moves to dismiss the indictment and urges in support of the motion several grounds herein discussed.

Statute

"The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

[fol. 10] "The commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions.

"Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport.

. . . . . .

"Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (18 U. S. C. 835.)

Counts One, Three and Five

These counts were apparently intended to charge violations of the following regulation: "Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." (Emphasis by the Court.) 49 C. F. R. 238, 1949 Ed., Section 197.1(b).

The defendant contends that the quoted regulation is invalid because of its failure to define an "ascertainable [fol. 11] standard of guilt." We agree with this contention. The regulation clearly imposes upon the "drivers of motor vehicles" the duty to avoid "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings," only "so far as practicable, and, where feasible." The duty is not absolute but is limited; it must be discharged only as far as practicable and where feasible. It is our opinion that these very terms are so vague and indefinite as to make the standard of guilt conjectural. Whether or not a particular course of conduct is practicable may depend, as it frequently does, on individual judgment; that which seems practicable to one may not seem practicable to another.

It was held by the Supreme Court in the case of Connally v. General Construction Co., 269 U. S. 385, at page 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." It is further stated in the opinion of the Court, at page 393: "A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it

is lawful for him to pursue." See also United States v. Cohen Grocery Co., 255 U. S. 81; Lanzetta v. New Jersey, 306 U. S. 451; Winters v. New York, 333 U. S. 507; but see United States v. Alford, 274 U. S. 264; Sproles v. Binford, [fol. 12] 286 U. S. 374; United States v. Ragen, 314 U. S. 513; United States v. Sullivan, 332 U. S. 689. It is our opinion that the four cases in the latter group are distinguishable but we see no reason to discuss the distinctions.

The views expressed by the Supreme Court in the case of Kraus & Bros. v. United States, 327 U. S. 614, are apposite. The Court, passing on the validity of a regulation promulgated by the Price Administrator pursuant to the Emergency Price Control Act, stated at page 621: "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. . . . The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action." These principles are equally applicable to regulations promulgated by the Commission.

We are fully aware that the disaster which led to the present prosecution emphasized the need for adequate regulations, but it is not within our power to make them. It was further stated in the case of Kraus & Bros. v. United States, at page 622: "A prosecutor in framing an indict-[fol. 13] ment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add

certainty or definiteness to otherwise vague language. Prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability." It should be apparent that we cannot, under the pretense of interpretation, give certainty to the regulation so as to make it meet the obvious need.

It should be further observed that the offense defined in the regulation is malum prohibitum, and intent is not an element of the offense as defined. It is for this further reason that the standard of guilt should be prescribed with a reasonable degree of certainty so that the ordinary person can intelligently determine what conduct is within the prohibition of the regulation.

There are additional grounds urged by the defendant in support of the motion. It seems unnecessary to consider these grounds, but we deem it advisable to discuss them. A discussion may be of some assistance and guidance in the future prosecution of cases of this character.

The defendant further contends that these counts fail to charge an offense. This contention is based solely upon the argument that the particular regulation is directed only to the "drivers of motor vehicles" engaged in the transportation of explosives and other materials. The argument is sound but it does not follow therefrom that others, for example the employers of drivers, may not be prosecuted for violations of the regulation. The regulation is, by its ex- [fol. 14] press language, applicable to the "drivers of motor vehicles," but others who aid, abet, counsel, command, induce or procure the commission of the offense therein defined, are principals and punishable as such. 18 U. S. C. 2(a); see Coffin v. United States, 162 U. S. 664; United States v. Johnson, 319 U. S. 503; United States v. Martinelli, 142 F. 2d 446. The statute, 18 U. S. C. 2(b), also provides: "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." This contention is therefore not sustainable.

The defendant urges as an additional ground that these counts of the indictment are ambiguous and duplicitous.

We agree that the language of these counts is ambiguous but we cannot agree that they are duplicitous. An indictment must charge an offense with a reasonable degree of certainty so that the accused may be informed as to the nature of the charge made against him. The purpose of this requirement is to enable the accused to prepare and make his defense and thereafter to plead the judgment as a bar to a subsequent prosecution for the same offense. These principles are so well established that we see no reason to cite cases in support of them.

These counts of the indictment fail to meet the basic requirements. It is suggested by the United States Attorney that some of the language is mere surplusage. We are inclined to concede that it probably is, but it is this surplus language that makes the counts of the indictment ambiguous. The surplusage will ordinarily not affect an indictment and may be disregarded, but where, as here, it creates an ambiguity, it should not be disregarded. We are no longer bound by the rigid rules of common law pleading but we have not abandoned the basic principles of good pleading. The present Rules of Criminal Procedure require nothing [fol. 15] more than "a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c). There is no reason why this rule cannot be followed.

Second, Fourth and Sixth Counts

These counts charge violations of the following regulation: "Every motor vehicle transporting any quantity of dangerous explosives, class A, poison gas, class A, or radioactive material, poison class D requiring red radioactive materials label, and every motor vehicle transporting 2500 pounds or more of explosives, class B, inflammable liquids, corrosive liquids, compressed gas and tear gas, or 5000 pounds or more of two or more articles of these groups shall be marked or placarded on each side and rear with a placard or lettering in letters not less than three inches high on a contrasting background." There follows a brief description sufficient to identify the required placard, 49 C. F. R. 7025; 1947 Sup., Sec. 823(a).

The defendant moves to dismiss these counts on the ground that their language is vague, indefinite and ambig-

uous. This ground is without merit. The language of these counts is not entirely free of ambiguity but it is sufficiently plain and concise so as to meet the requirements hereinabove discussed. There can be no doubt as to the nature of the charges therein made against this defendant.

All Counts

The principal ground urged by the defendant in support of the motion is that there is inherent in the statute as unlawful delegation by Congress of legislative power, in [fol. 16] violation of the Constitution. This ground is founded upon the usual argument that the Act fails to prescribe adequate standards for the guidance of the Commission. It is our opinion that this ground and the argument advanced in support of it are without merit. Buttfield v. Stranahan, 192 U. S. 470; Sunshine Coal Co. v. Adkins, 310 U. S. 381; Yakus v. United States, 321 U. S. 414; American Power & Light Co. v. Securities & Exchange Commission, 141 F. 2d 606, 625, and the other cases therein cited. It is our opinion that the standards prescribed by the Act, considered in the light of its obvious purpose and the declaration of policy contained in the preamble of the Act of September 18, 1940, c. 722, Title 1, 54 Stat. 899, 49 U. S. C. A., preceding 1, satisfy the constitutional requirements and afford an adequate guide to the Commission.

The statement by the Supreme Court in the case of Sunshine Coal Co., supra, at page 398, would seem to be particularly applicable here. It was therein stated: "In the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist upon a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." It cannot be denied that the Interstate Commerce Commission is a competent and experienced administrative agency.

[fol. 17] Conclusion

Counts one, three and five will be dismissed for the reasons herein stated. The motion addressed to counts two, four and six will be denied for the reasons herein stated. The United States Attorney will prepare and submit to the Court a proper order.

In United States District Court, District of New Jersey

Order—November 21, 1950

The defendant Boyce Motor Lines, Inc., having made a motion for the dismissal of the above entitled indictment, and the motion having been argued before the Court by Joseph C. Glavin, Esq., for the motion on behalf of the defendant, and Charles J. Tyne, Assistant United States Attorney in opposition thereto; the Court having considered the arguments and briefs submitted by respective counsel, and the Court having filed an Opinion on the 15th day of June, 1950, in which it was determined that Counts 1, 3 and 5 of the above entitled indictment should be dismissed, and that the motion should be denied as to counts 2, 4 and 6 for the reasons stated therein,

It is, on this 21st day of November, 1950, Ordered that Counts 1, 3 and 5 of the above entitled indictment be and the same hereby are dismissed, and that the defendant's motion to dismiss Counts 2, 4 and 6 of the indictment be and the same hereby is denied.

William F. Smith, United States District Judge.

[fol. 18] [Stamp:] Received Jun. 13, 1951. Office of the Clerk, Supreme Court, U. S.

[Stamp:] Received & Filed Jan. 9, 1951. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

APPLICATION BY THE PORT OF NEW YORK AUTHORITY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

[fol. 19] Please take notice that upon the annexed affidavit of Russell E. Watson, verified the 4th day of January, 1951, the undersigned will move this Court on a day for motions to be held at the United States Courthouse, in Philadelphia, Pennsylvania, on the 15th day of January, 1951, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting leave to The Port of New York Authority to file a brief as *amicus curiae* in this case.

Russell E. Watson, Attorney for The Port of New York Authority, 390 George Street, New Brunswick 1, New Jersey.

[fol. 20] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Russell E. Watson, being duly sworn, deposes and says:

1. I am an Attorney-at-Law, duly admitted to practice in the United States Court of Appeals for the Third Circuit. I am an attorney for The Port of New York Authority and have been duly authorized by The Port of New York Authority to represent it in the above entitled proceedings.

2. Prior to this proceeding, applicant petitioned the parties to the case for consent to the filing of a brief as *amicus curiae*. While appellant, the United States of America, granted its consent, defendant-appellee refused.

3. The question involved in the appeal of this case is whether the regulation promulgated by the Interstate Com-
[fol. 21] merce Commission, 49 CFR 238, 1949 Ed., Section 197.1 (b), pursuant to Congressional authorization contained in Section 835, 18 United States Code, 62 Stat. 739, meets the constitutional requirement that a criminal statute or regulation afford an ascertainable standard of guilt.

4. The Port of New York Authority, a governmental agency created by Compact between the States of New York and New Jersey, operates bridges and tunnels which connect the two states and which are used by vehicles moving in interstate commerce between them.

5. The Port of New York Authority here seeks leave to file a brief as *amicus curiae* in support of the Government's position for the following reasons:

(a) The question of the validity of the regulation arises from the dismissal of counts of an indictment predicated upon the explosion on May 13, 1949 of the cargo of defendant's vehicle in the Holland Tunnel, a facility operated by The Port of New York Authority, which explosion resulted

in over one-half million dollars property damages, sixty persons injured and one person dead; and

(b) The regulation in question is designed to effectuate the Congressional intent that there be a safe transportation of dangerous cargo in interstate commerce. It is of vital concern to The Port of New York Authority that the validity [fol. 22] of the regulation be sustained, for as operator of various tunnels and bridges which carry a continuous flow of vehicles throughout the day and night, The Port of New York Authority is deeply concerned that the users of its facilities shall be spared any bodily injuries such as those suffered in the holocaust of May 13, 1949, and that their property and its facilities be protected from damages comparable to or even greater than the damage suffered by the Holland Tunnel as a result of the explosion of the cargo of defendant's vehicle.

6. No previous application has been made for this relief.

Wherefore, I respectfully pray that an order be made and entered herein granting the within motion, and for such other and further relief as this Court may deem just and proper in the premises.

Russell E. Watson.

Sworn to before me this 4th day of January, 1951. Jack F. Burdi, Notary Public for the State of New York, Qualified in Kings County, No. 24-0492125. Certs. filed with Co. Clerks, Bronx, New York, Queens & Richmond and with City Register, New York, Bronx, Kings & Queens. Commission expires March 30, 1951.

[fol. 23] [Stamp:] Received & Filed Jan. 9, 1951. Ida O. Creskoff, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

10,368

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

NOTE OF ISSUE

[fol. 24] Motion for an Order granting leave to The Port of New York Authority to appear herein as *amicus curiae* and in such capacity to serve and file a brief *amicus curiae* with this Court in this case.

Motion returnable 10:30 A. M., January 15, 1951.

For the Motion—Russell E. Watson, Esq., Attorney for The Port of New York Authority, Office and Post Office Address: 390 George Street, New Brunswick, New Jersey.

Counsel for Appellant—Charles J. Tyne, Esq., Assistant United States Attorney, United States Post Office Building, Newark 1, New Jersey.

Counsel for Appellee—Joseph C. Glavin, Esq., 921 Bergen Avenue, Jersey City 6, New Jersey.

[fol. 25] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

10368

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

ORDER

Present: Goodrich, Kalodner and Staley, Circuit Judges.

This cause came on to be heard on the motion of Russell E. Watson, Esq., A. Dudley Watson, Esq., of counsel, attorney for The Port of New York Authority, for an order

granting leave to The Port of New York Authority to serve upon the parties and to file a brief *amicus curiae* with this Court in this case, and after hearing counsel and due consideration, it is ordered, adjudged and decreed that The Port of New York Authority be granted leave to serve and file a brief *amicus curiae* in this case within five days from the date of this order.

Dated: January 15, 1951.

Herbert F. Goodrich, Judge of Court of Appeals, Third Circuit.

(Received & Filed Jan. 15, 1951. Ida O. Creskoff, Clerk.)

[fol. 26] [Endorsed:] In the United States Court of Appeals for the Third Circuit. United States of America, Appellant, against Boyce Motor Lines, Inc., Appellee. Order.

[fol. 27] [Stamp:] Received & Filed Feb. 2, 1951, Ida O. Creskoff, Clerk.

UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 10,368

UNITED STATES OF AMERICA, Appellant,

vs.

BOYCE MOTOR LINES, INC., Appellee

On Appeal &c. *Stipulation*

It is hereby stipulated and agreed by and between counsel for the respective parties as follows:

1. That the appellee requires additional time for the preparation and filing of its brief herein, because of the fact that more than five months elapsed between the filing of the opinion of the District Judge and the entry of the order dismissing Counts 1, 3 and 5 of the Indictment. Consequently the attorney for the appellee lost touch and familiarity with the cases and law involved and will of necessity be required to engage in extensive research in order to meet the questions raised in appellant's brief. In

addition, the Port of New York Authority obtained leave of this Court to file a brief as amicus curiae and in said brief made legal contentions different from those raised in appellant's brief, which must also be met in appellee's brief. Furthermore, counsel for appellee, in the interim between the filing of the opinion and the entry of the order on which this appeal was taken, had made important commitments and became engaged in extensive and time consuming litigation, all of which prevented them from devoting sufficient time, within the period allowed by the rules, to adequately and properly prepare appellee's brief. It is, therefore, impossible to file appellee's brief within time.

[fol. 28] 2. That the Court be respectfully requested to grant an order extending the time for the filing of appellee's brief to February 20, 1951. Said extension of time to include the filing of appellee's reply brief to the brief filed by the Port of New York Authority as amicus curiae, as well as to appellant's brief.

Dated: January 30, 1951.

Joseph C. Glavin, Attorney for Appellee, Boyce Motor Lines, Inc. Grover Cleveland Richman, Jr., Attorney for Appellant, United States of America.

Feb. 2, 1951. Approved. Kalodner, J.

[fol. 29] [Endorsed:] United States Court of Appeals for the Third Circuit, Docket No. 10,368. United States of America, Appellant, vs. Boyce Motor Lines, Inc., Appellee. On Appeal, &c. *Stipulation.* Joseph C. Glavin, Attorney for Appellee, Boyce Motor Lines, Inc., 921 Bergen Avenue, Jersey City, N. J.

[fol. 30] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

vs.

BOYCE MOTOR LINES, INC.

Upon consideration of the stipulation of counsel to extend time for filing appellee's brief in the above-entitled case to February 20, 1951,

It is Ordered that the stipulation be, and it is hereby approved.

Kalodner, Circuit Judge.

February 2, 1951.

(Received & Filed Feb. 2, 1951. Ida O. Creskoff, Clerk).

[fol. 31] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

v.

BOYCE MOTOR LINES, INC.

Appeal from the United States District Court for the District of New Jersey

Submitted March 6, 1951

Before Maris, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed May 3, 1951

By MARIS, Circuit Judge:

This is an appeal by the United States from so much of an order of the District Court for the District of New Jersey as dismissed counts 1, 3 and 5 of an indictment against the defendant, Boyce Motor Lines, Inc. The three

counts charged the defendant with three separate violations of the provisions of § 197.1(b) of a regulation of the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles by motor vehicle. 49 CFR (1949 Ed.) § 197.1(b). This regulation was promulgated by the Interstate Commerce Commission [1], pursuant to the authority conferred upon it by 18 U. S. C. § 835, which [fol. 32] section also makes the knowing violation of the regulation a criminal offense. Holding that § 197.1(b) of the regulation is so vague and indefinite as not to set forth an ascertainable standard of guilt the district court concluded that the section was invalid and accordingly dismissed the counts of the indictment which charged the violation of it. 90 F. Supp. 996.

§ 197.1(b) with which we are here concerned provides:

> "(b) *Avoidance of congested places.* Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

The pertinent provisions of 18 U. S. C. § 835 are as follows:

> "The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common

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[1] Filed May 14, 1943, effective June 15, 1943, 8 F. R. 6481, amended 9 F. R. 541.

carrier engaged in interstate or foreign commerce by land or water.

. . . .

"Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall [fol. 33] be fined not more than $10,000 or imprisoned not more than ten years, or both."

The district court held the regulation invalid because it concluded that the violation of it is malum prohibitum in which intent is not a factor and, that being so, the use of the phrases "so far as practicable" and "where feasible" are so vague and indefinite as to make conjectural the standard of guilt which is sought to be set up by the regulation. We do not agree.

When the regulation is read with 18 U. S. C. § 835, the statute under which it was promulgated and which makes its violation a criminal offense, it becomes clear that the offense is not merely malum prohibitum but that a specific wrongful intent, i. e., actual knowledge of the existence of a duty under the regulation and a wrongful intent to evade it, is of the essence of the offense. This the United States concedes. The vice which the district court saw in the regulation was that it placed the defendant on trial for an offense of which it had no adequate warning. The court relied in this connection upon the rule laid down in United States v. Cohen Grocery Co., 1921, 255 U. S. 81, and Connally v. General Const. Co., 1926, 269 U. S. 385. In another series of cases,[2] however, the Supreme Court has pointed out that where the punishment imposed is "only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects

[2] Omaechevarria v. Idaho, 1918, 246 U. S. 343, 348; Hygrade Provision Co. v. Sherman, 1925, 266 U. S. 497; United States v. Ragen, 1942, 314 U. S. 513; Screws v. United States, 1945, 325 U. S. 91, 102.

uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." Screws v. United States, 1945, 325 U. S. 91, 102. We think that this rule is applicable here. [fol. 34] The regulation makes it the duty of drivers of motor vehicles transporting the explosives or other dangerous articles referred to, "so far as practicable, and, where feasible, by prearranging their routes to avoid driving into or through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." To one who knows of his duty under the regulation the imposition of a duty to arrange to use that route which avoids congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings, so far as practicable and where feasible, is not to put him to a choice so uncertain as to violate the Constitution.

It is true, of course, that individuals may differ as to what is practicable and as to what is feasible and that marginal cases may arise in which a defendant's view as to the practicability and feasibility of an alternative route may differ from the view of the jury which tries him. But as Justice Holmes said in Nash v. United States, 1913, 229 U. S. 373, 377:

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

Moreover, we regard the standard here as reasonably certain. For we think that "so far as practicable" means so far as commercially practicable from the standpoint of those engaged in the trucking business,[3] and "where feasible" undoubtedly means where physically feasible from the standpoint of the operation of the motor vehicle involved.

The conclusion which we have reached finds full support in Sproles v. Binford, 1932, 286 U. S. 374, in which case the

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[3] See United States v. Wise, C. C. S. D. Ohio, 1881, 7 F. 190; The Benton, D. C. E. D. Mo. 1892, 51 F. 302.

[fol. 35] Supreme Court upheld a Texas statute, also dealing with safety regulations for motor vehicle transportation, which set up a standard of practicability somewhat analogous to that involved in the present regulation. In discussing in that case the contention that this provision was so uncertain as to afford no standard of conduct which it was possible to know, Chief Justice Hughes said, (p. 393:)

> "'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U. S. 86, 109; *Nash v. United States*, 229 U. S. 373, 377; *Miller v. Strahl*, 239 U. S. 426, 434; *Omaechevarria v. Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502; *Bandini Co. v. Superior Court*, 284 U. S. 8, 18. The use of common experience as a glossary is necessary to meet the practical demands of legislation."

The defendant urges that the use of the terms "congested thoroughfares," "places where crowds are assembled" and "dangerous crossings" are also so indefinite as to invalidate the regulation. We do not think so. It must be remembered that these phrases are not to be considered or applied in vacuo. They only come into play in connection with the consideration by those responsible for the operation of a motor vehicle of the alternative routes which are open to them. Under these circumstances an individual will ordinarily have little difficulty in determining which of two or more practicable and feasible routes involves the fewest congested th-roughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination.

[fol. 36] Finally the defendant asserts that the counts in question are vague, indefinite and ambiguous and do not fully inform it as to the nature and extent of the crime with which it is charged because in addition to charging a violation of § 197.1(b) of the regulation they also allege that the

motor vehicle in question did not bear any marks or signs on its sides and rear indicating that it was transporting a dangerous and inflammable liquid. The district court held that the counts are so ambiguous as to be dismissible on that ground.[4] It is true that this particular allegation does not involve a violation of § 197.1(b) [5] but we think that its inclusion in the counts is mere surplusage which does not create any ambiguity or prejudice the defendant. It may, therefore, be disregarded.[6]

So much of the order of the district court as dismissed counts 1, 3 and 5 will be reversed and the cause will be remanded with directions to reinstate those counts of the indictment.

A true Copy:
Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

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[4] This was a ground of decision independent of the construction of the statute and regulation. It accordingly supports the jurisdiction of this court on this appeal under 18 U. S. C. § 3731. U. S. v. Wayne Pump Co., 1942, 317 U. S. 200.

[5] The allegations apparently involve a violation of § 823 (a) of 49 CFR, 1947 Supp., p. 7025.

[6] Ford v. United States, 1927, 273 U. S. 593; Bowdry v. United States, 8 Cir. 1928, 26 F. 2d 791, 793; McKinney v. United States, 9 Cir. 1949, 172 F. 2d. 781, 782.

[fol. 37] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

vs.

BOYCE MOTOR LINES, INC.

On Appeal from the United States District Court for the District of New Jersey.

Present: Maris, McLaughlin and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that so much of the order of the said District Court in this case as dismissed counts 1, 3 and 5 be and the same is hereby reversed and the cause remanded with directions to reinstate those counts of the indictment.

Attest.

Ida O. Creskoff, Clerk.

May 3, 1951.

(Received & Filed May 3, 1951. Ida O. Creskoff, Clerk.)

[fol. 38] UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable, the Judges of the United States District Court for the District of New Jersey, Greeting:

Whereas, lately in the United States District Court for the District of New Jersey, before you or some of you, in a cause between United States of America, Plaintiff (Appellant), and Boyce Motor Lines, Inc., Defendant (Appellee)—Crim. No. 330-49—an order was entered in the District Court on

November 21, 1950, which order is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideraiton whereof, it is now here ordered and adjudged by this Court that so much of the order of the said District Court in this case as dismissed counts 1, 3 and 5 be and the same is hereby reversed and the cause remanded with directions to reinstate those counts of the indictment.

May 3, 1951.

[fol. 39] You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 21st day of May in the year of our Lord one thousand nine hundred and fifty-one.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

[Endorsement:] Crim. No. 330-49. No. 10,368. United States of America, Appellant, vs. Boyce Motor Lines, Inc. Copy. Mandate. Received & Filed May 21, 1951. Ida O. Creskoff, Clerk.

[fol. 40] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, and proceedings in this court in the case of United States of America, Appellant, vs. Boyce Motor Lines, Inc., No. 10,368, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 4th day of June in the year of our Lord one thousand

nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-fifth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

[fol. 41] [Stamp:] Received May 25, 1951. Office of the Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

BOYCE MOTOR LINES, INC., Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 2, 1951.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of May, 1951.

[fol. 34] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 167

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8001)

No. 167

Office Supreme Court, U. S.
FILED
JUL 2 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

BOYCE MOTOR LINES, INC.,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AGAINST THE ABOVE-NAMED RESPONDENT.

JOSEPH C. GLAVIN,
Attorney of Boyce Motor Lines, Inc., Petitioner,
921 Bergen Avenue,
Jersey City 6, New Jersey.

A. HARRY MOORE,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

BOYCE MOTOR LINES, INC.
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AGAINST THE ABOVE-NAMED RESPONDENT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of Boyce Motor Lines, Inc. alleges and respectfully shows to this Honorable Court:

A Summary Statement of the Matter Involved.

This petition seeks to review a determination of the Court of Appeals for the Third Circuit which reversed an order of the United States District Court for the District of New Jersey.

The Grand Jury in and for the District of New Jersey returned an indictment of which Counts 1, 3, and 5 charged the defendant with violation of a certain regulation (49 C. F. R. 238, 1949 Ed. Section 197.1(b)) promulgated by the Interstate Commerce Commission pursuant to Section 835 of Title 18, United States Code. The District Court dismissed Counts 1, 3, and 5 on the ground that the Interstate Commerce Commission regulation, violation of which was the foundation of said counts, is invalid because the regulation fails to meet the constitutional requirement that a criminal statute or regulation afford an ascertainable standard of guilt.

The other three counts of the indictment were sustained by the District Court and no appeal was taken from such decision.

The Court of Appeals for the Third Circuit reversed the District Court and sustained Counts 1, 3, and 5 of the indictment.

The opinion of the District Court, reported in 90 F. Supp. 996, is printed at pp. 9a-17a of the Record. The opinion of the Court of Appeals, not yet reported, is printed at pp. 24-29 of the Record.

The question involved in this appeal is whether the following regulation promulgated by the Interstate Commerce Commission, (49 C. F. R. 238, 1949 Ed., Sec. 197.1 (b)) meets the constitutional requirement that a criminal regulation afford an ascertainable standard of guilt:

> "Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practi-

cable and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

The regulation was promulgated by the Interstate Commerce Commission pursuant to Section 835 of Title 18, United States Code which reads as follows:

"The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

. . . . . .

"Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Count 1 of the indictment (R. pp. 2a-3a) charged the defendant with committing a crime in that it transported carbon bisulphide by truck from Cascade Mills, New York, through the State of New Jersey en route to Brooklyn, New York and that it caused its driver to drive the motor vehicle

containing the shipment into the Holland Tunnel at Jersey City, New Jersey; and that there were other available and more practical routes for the transportation of said shipment. Counts 3 and 5 of the indictment allege substantially the same offense with reference to different dates.

The District Court in its opinion (R. pp. 10a-11a) stated:

> "The defendant contends that the quoted regulation is invalid because of its failure to define an 'ascertainable standard of guilt.' We agree with this contention. The regulation clearly imposes upon the 'drivers of motor vehicles' the duty to avoid 'congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,' only 'SO FAR AS PRACTICABLE, and, WHERE FEASIBLE.' The duty is not absolute but is limited; it must be discharged only as far as practicable and where feasible. It is our opinion that these very terms are so vague and indefinite as to make the standard of guilt conjectural. Whether or not a particular course of conduct is practicable may depend, as it frequently does, on individual judgment; that which seems practicable to one may not seem practicable to another."

The District Court relied in this connection upon the rule laid down by this Court in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 and *Connally* v. *General Construction Co.*, 269 U. S. 385.

The Court of Appeals, in reversing, relied upon the decision in *Screws* v. *United States*, 325 U. S. 91, on the ground that this decision held that where "wrongful intent" is part of the offense charged, the regulation need not contain a clearly ascertainable standard of guilt. The Court

indicated (R. p. 28) that it will be a question for the jury to determine which of two or more routes involves the "fewest congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings"; and said "the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination."

The Basis Upon Which This Court Has Jurisdiction to Review the Judgment in Question.

(a) The jurisdiction of this Court to review the judgment in question is based on Act of June 25, 1948, ch. 646, 62 Stat. 928 (Tit. 28 U. S. Code, 1948 ed., Section 1254 (1)).

(b) This appeal involves the validity of a regulation of the Interstate Commerce Commission, 49 C. F. R. 238, 1949 ed., Section 197.1(b), as promulgated pursuant to Section 835 of Title 18, U. S. Code, the pertinent provision of both of which are set forth in full above.

(c) The date of the judgment of the Court of Appeals sought to be reviewed is May 3, 1951. By order of this Court dated May 25, 1951 (R. p. 32), the time for filing this petition was extended to and including July 2, 1951. The date of the filing of this petition is July 2, 1951.

The Question Presented.

Whether the regulation (49 C. F. R. 238, 1949 ed., Sec. 197.1(b)) requiring drivers of motor vehicles transporting explosives and other dangerous articles to avoid so far as

practicable and, where feasible, by the pre-arrangement of routes, congested thoroughfares, tunnels, etc., prescribes an ascertainable standard of guilt adequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them as required by the Fifth and Sixth Amendments to the Constitution.

Reasons Relied On for the Allowance of the Writ.

1. The determination of this question presents a matter of vital importance to the entire trucking industry of the United States and involves a matter of public interest.

The transportation of explosive and inflammable liquids by truck is perfectly legal and, in fact, is essential not only to our economy generally, but particularly at this time in connection with our national defense effort.

The Interstate Commerce Commission has promulgated clear rules as to the packaging of such dangerous articles and the marking of the vehicles used to transport them. Such regulations must certainly be complied with and are not here in question.

When we come to the regulation which is involved in this application, however, an entirely different question is presented. The facts of the present case as set forth in the indictment graphically present the problem:

Here the defendant is charged with a crime in that in the course of transporting certain articles to Brooklyn, New York, defendant's truck entered the Holland Tunnel, a vehicular crossing under the Hudson River, alleged in the indictment to be "a congested thoroughfare", when

"there were other available and more practicable routes for the transportation of said shipment." (R. pp. 2a-3a).

Judicial notice must be taken of the fact that it is physically impossible for a truck to enter Brooklyn, New York, without "driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts * * *" (49 C. F. R. 238, 1949 Ed. Sec. 197.1 (b)).

The prohibition in the regulation is not against entering or driving into such places. It is against entering or driving into them only when it is "practicable" or "feasible" to avoid such places.

Who is to determine which of several routes is more practicable or feasible than another? Is the George Washington Bridge across the Hudson with its viaduct approaches more feasible than a tunnel without viaduct approaches? Shall a truck go along street car tracks and avoid a tunnel, or go through a tunnel and avoid street car tracks? Nowhere in New York City, en route to Brooklyn could a truck go without driving into or through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings."

The prohibition in the regulation is not absolute but is limited. It requires the avoidance of such places only as far as "practicable" and where "feasible." No standard is set up to establish what may be considered as more "practicable" or more "feasible." The Court of Appeals recognized that a choice between two evils would have to be made by the trucking company when it said (R. p. 28):

> "In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination."

If this regulation is allowed to stand in its present form, no trucking company can, without subjecting itself to criminal penalties, enter any urban community, since no standard is set up to guide a jury in determining what is meant by "practicable" and "feasible" in the regulation.

2. The Court of Appeals has given to the decision in *Screws* v. *United States*, 325 U. S. 91 an application which is contrary to the decisions in *Connally* v. *General Construction Company*, 269 U. S. 385 and *United States* v. *Cohen Grocery Co.*, 255 U. S. 81.

In *Connally* v. *General Construction Company, supra*, this Court struck down as void for uncertainty an Oklahoma statute which imposed criminal penalties upon contractors dealing with the state who paid to their workmen less than the "current rate of per diem wages in the locality where the work is performed." The Court said at page 395:

> "The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guarantee of due process cannot be allowed to rest upon a support so equivocal."

In *United States* v. *Cohen Grocery Co., supra*, this Court struck down a Federal statute which imposed criminal pen-

alties on the making to any person of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

The decisions of this Court have always construed the Fifth and Sixth Amendments to the Constitution as requiring that a statute set forth an ascertainable standard of guilt so that a citizen can determine from the language of the statute or regulation whether his course of conduct is one which will involve him in criminal penalties. As this Court pointed up in *Connally* v. *General Construction Company, supra:*

> "'* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another * * *'" (p. 393).

To leave to the determination of a jury the question as to whether a particular route is more "practicable" or more "feasible" than another route is to deprive a citizen of his right to determine from the statute or regulation what the standard of guilt will be and to leave this standard up to the whim or caprice of a jury.

The decision of the Court of Appeals in reversing the District Court and upholding the indictment gives an interpretation to the decision in *Screws* v. *United States, supra*, which would put that decision directly in contradiction to *Connally* v. *General Construction Company, supra*, and *United States* v. *Cohen Grocery Co., supra*. In the *Screws* case the question was whether Section 20 of the Criminal Code violates the due process clause of the Fourteenth Amendment. That section made it a criminal offense willfully to deprive any person of "any rights, privileges, or immunities, secured or protected by the constitution and laws of the United States." This Court upheld this provision of the statute but held that a conviction thereunder could be had only if, as part of the offense, a jury should find that the act was done with the specific intent to deprive a person of a right granted to him by the Constitution or laws of the United States.

The Court of Appeals in the instant case has distorted the decision in the *Screws* case by stating that this decision is applicable since the instant statute requires "actual knowledge of the existence of a duty under the regulation and a wrongful intent to evade it." In view of the manner in which the *Screws* case was admittedly decided as evidenced by the statement of Mr. Justice Rutledge in his opinion (325 U. S. at p. 134), any extension of the principle thus engendered would appear unwarranted. Naturally, trucking companies are charged with a knowledge of the regulations. But what is meant by the phrase "a wrongful intent to evade it"? The problem here is that the trucking company may choose a route which may be "practicable" or "feasible" even though it may pass through crowded

thoroughfares, tunnels, and viaducts—but there is no standard laid down in the regulation to define what is meant by "practicable" or "feasible". The Court of Appeals admits that "individuals may differ as to what is practicable and as to what is feasible and that marginal cases may arise in which a defendant's view as to the practicability and feasibility of an alternative route may differ from the view of the jury which tries him." (R. p. 27). This observation brings the regulation clearly and squarely within the condemnation of this court in the *Connally* case. But "practicable" and "feasible" are not words of commonly accepted meaning such as a "reasonable standard of care" in negligence cases. They are words which impose upon the defendant the duty of making a choice at his risk with no ascertainable standard for determining which of the choices considered may be innocent and which may involve criminality.

This situation is entirely different from that in the *Screws* case wherein this Court properly pointed out that a defendant could be convicted under Section 20 of the Criminal Code where he willfully intended to deprive a person of a right guaranteed him under the laws or Constitution of the United States. The existence of those laws, the knowledge of the defendant thereof and the intent to deprive the other person of his right under those laws were all matters of definite ascertainment. There was no question of alternative choices as there was in the *Connally* case, the *Cohen Grocery Co.* case and as there is in the instant case.

The decision of the Court of Appeals in this case, if allowed to stand, puts upon the *Screws* case a significance

which does not appear from the decision in that case. Such significance would furnish a precedent for the sustaining of vague and indefinite regulations of administrative bodies under circumstances requiring a choice to be made by a defendant at the risk that some jury may later disagree with his choice and impose criminal penalties upon him for having guessed wrong.

Professor Julius Cohen in his article on "The Screws Case" in the Columbia Law Review, 46 Col. L. Rev. 94, pointed out this distinction in the following language:

> "Whatever may be the difficulties in demarcating—to the satisfaction of the criminal law standard of certainty—all of the constitutional rights to which a person may be entitled under the Fourteenth Amendment; there can be no doubt but that the right not to be deprived of *life* without 'due process' is, to enforcement officers at the very least, a known constitutional right. It is not a case, as in *United States* v. *Cohen. Grocery Co.*, in which the statute left open 'the widest conceivable inquiry, the scope of which no one can foresee * * * or adequately guard against,' or where 'to attempt to enforce the * * * [law] would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury'." (at p. 104).

The Court of Appeals has interpreted the *Screws* case to mean that a statutory requirement of "intent" is a sufficient substitute for a clearly defined standard of right or wrong. There is no basis for such conclusion. Since intent merely describes the state of mind which is required to accompany a proscribed act, a statute must be certain or

uncertain, not in terms of the intent required, but in terms of the act itself.

The Court of Appeals also relied on *Sproles* v. *Binford*, 286 U. S. 374 which is patently distinguishable from the instant case since the text of the statute involved in that case, by referring to the "nearest" carrier and by prescribing that the "shortest" route be taken, affords a definite standard of conduct which is wholly lacking in the regulation under consideration.

For the foregoing reasons, it is repectfully requested that the Court grant this petition for review of the judgment of the Court of Appeals for the Third Circuit as aforesaid.

Respectfully submitted,

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A. HARRY MOORE,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 167.

BOYCE MOTOR LINES, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

Opinions Below.

The opinion of the Court of Appeals (R. 20-25) is reported at 188 F. 2d 889, and the opinion of the District Court (R. 7-13) is reported at 90 F. Supp. 996.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). This appeal involves the validity of a regulation of the Interstate Commerce Commission, 49 C. F. R. 238, 1949 ed., Sec. 197.1(b), as promulgated pursuant to 18 U. S. C. 835, the pertinent provisions of both of which are set forth in full below. The judgment of the Court of

Appeals to be reviewed (R. 26) was entered on May 3, 1951. By order of Mr. Justice Burton dated May 25, 1951 (R. 28) the time for filing a petition for writ of certiorari was extended to and including July 2, 1951, and the petition was filed on that date. Writ of certiorari was granted by order of this Court entered on October 15, 1951 (R. 29).

Statement of the Case.

Petitioner was indicted by a Federal Grand Jury for the District of New Jersey on six counts. The indictment was laid under Section 835 of Title 18, U. S. Code (R. 1-6), which provides:

> "The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids; oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.
>
> * * * * * * *
>
> "Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Counts 1, 3 and 5 of the indictment only are involved here. In each of said counts petitioner is charged with violating a regulation of the Interstate Commerce Commission, i. e. 49 C. F. R. 238, 1949 Ed. Sec. 197.1 (b). This regulation reads as follows:

> "*Avoidance of congested places.* Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous clossings."

The question involved in this appeal is whether that Regulation meets the constitutional requirement that a regulation, carrying a criminal penalty, must afford an ascertainable standard of guilt.

Count 1 of the indictment (R. 1-2) charged that petitioner, a common carrier by motor vehicle, in interstate commerce, operated a motor vehicle containing a shipment of carbon bisulphide, an inflammable liquid, from Cascade Mills, New York, throughout the State of New Jersey en route to Brooklyn, New York and caused the vehicle to be driven into the Holland Tunnel at Jersey City, New Jersey, where said liquid flamed and exploded; the indictment alleged that the Holland Tunnel was a "congested thoroughfare" and that there were other "available and more practicable routes for the transportation of said shipment." It states that as a result of the "violation" bodily injury was caused to certain persons.

Counts 3 and 5 (R. 3-4, 5-6) differ from Count 1 only in respect of the dates on which the alleged violations oc-

curred and the fact that no untoward occurrence took place during the journeys.

Petitioner moved in the District Court to dismiss the indictment on various grounds, of which only the following are pertinent to this appeal:

> "2. The language of each of said counts is vague, indefinite and ambiguous and does not fully inform the defendant of the nature and extent of the crime with which it is charged."
>
> "5. The regulation, (49 C. F. R. Cumm. Supp. 197.1 (b)), upon which the offense charged in each of said counts is based, is vague, indefinite and conjectural; contains no ascertainable standard of guilt and is inadequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them."

The District Court dismissed counts 1, 3 and 5 (R. 7-12) on the ground, among others, that the Regulation by its very terms is so vague and indefinite as to make the standard of guilt conjectural and, consequently, prescribes no ascertainable standard of guilt as required by law.

The United States appealed to the Court of Appeals for the Third Circuit from the order dismissing Counts 1, 3 and 5. That court, in an opinion by Judge Maris, Circuit Judge, (R. 20-25), reversed the order of the District Court and remanded the cause with direction to reinstate Counts 1, 3 and 5. Judgment and Mandate were duly entered (R. 26-27) in the Court of Appeals.

A writ of certiorari to the Court of Appeals for the Third Circuit, on petition of petitioner, was allowed by this Court on October 15, 1951 (R. 29).

Specification of Errors.

The Court of Appeals erred in holding that the Regulation of the Interstate Commerce Commission (49 C. F. R. 238, 1949 ed., Sec. 197.1(b)) requiring drivers of motor vehicles transporting explosives and other dangerous articles to "avoid, so far as practicable and, where feasible, by the pre-arrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings", prescribes an ascertainable standard of guilt adequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them as required by the Fifth and Six Amendments to the Constitution.

ARGUMENT.

The Regulation upon which the offense charged in each of the First, Third and Fifth Counts of the Indictment is based, is vague, indefinite and conjectural; contains no ascertainable standard of guilt and is inadequate to inform persons accused of the violation thereof of the nature and cause of the accusation against them.

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *."

This provision requires that the terms of a penal statute must be sufficiently explicit to inform persons subject to it as to what conduct on their part will render them liable to its penalties. (*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89.)

A companion provision in the Fifth Amendment, prohibiting the deprivation of life, liberty and property without due process of law, stated in its simplest terms, requires that a statute which forbids the doing of an act must not be so vague that men of common intelligence must guess as to its meaning or differ as to its application. (*Connally* v. *General Construction Co.*, 269 U. S. 385, 391.)

The test as to whether a statute violates these constitutional requirements is well stated in *Connally* v. *General Construction Co., supra,* wherein this Court, in striking down a statute requiring that general contractors working on state projects should pay employees not less than the current rate of per diem wages in the locality where the work is performed, said:

> "* * * the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties * * *
>
> "* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what

> course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another * * *.' " (p. 391-3).

In *Kraus & Bros.* v. *United States*, 327 U. S. 614, this Court, in passsing on the validity of a maximum price regulation prohibiting the evasion thereof, directly or indirectly, by way of commission, discount, "or otherwise", said:

> "The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action." (pp. 621 and 622).

The duty imposed by the statute must be sufficiently definite that reasonable men may be guided thereby and not such as would cause the minds of reasonable men to differ as to compliance with or violation of the statute. As this Court said in *Winters* v. *New York*, 333 U. S. 507, in striking down a statute prohibiting the distribution of news or stories of criminal violence so massed as to incite violence or crime:

> "The crime 'must be defined with appropriate definiteness' * * * There must be ascertainable standards of guilt. Men of common intelligence can not be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the Act * * * or in regard to the applicable tests to ascertain guilt." (pp. 515-6).

The Regulation (49 C. F. R., 197.1(b) 1949 Ed.), upon which the offense charged in Counts 1, 3 and 5 is based, provides:

> "*Avoidance of congested places.* Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

The District Court found that the Regulation did not set forth an ascertainable standard of guilt. It said in its opinion:

> "The duty is not absolute but is limited; it must be discharged only so far as practicable and where feasible. It is our opinion that these very terms are so vague and indefinite as to make the standard of guilt conjectural. Whether or not a particular course of conduct is practicable may depend, as it frequently does, on individual judgment; that which seems practicable to one may not seem practicable to another" (R. 8).

The Court of Appeals in reversing the District Court relied upon the decision of this Court in *Screws* v. *United States*, 325 U. S. 91. It pointed out that punishment in the present case could be imposed only where a defendant "knowingly violates" the regulation. The Court of Appeals based its decision upon the following quotation from the majority opinion in the *Screws* case:

> "The requirement that the act must be willful or purposeful may not render certain, for all pur-

> poses, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware" (R. 22-23).

We believe that the Court of Appeals has misapplied the decision in the *Screws* case. This Court itself pointed out, in the quotation above set forth, that the fact that an act is required to be willful does not make certain "a statutory definition of a crime which is in some respects uncertain."

The majority opinion in the *Screws* case stated:

> "Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something" (p. 105).

The issue in the *Screws* case was whether the constitutional requirements "have been defined." The majority of the Court held that the constitutional requirements involved in that case were specific and definite. It is the position of petitioner in the instant case that the duty of the trucker under the Regulation is not defined and that it is not specific and definite but left open to conjecture. To extend the doctrine of the *Screws* case to the extent done

by the Court of Appeals would over-rule the well established doctrine that "the dividing line between what is lawful and unlawful cannot be left to conjecture." *Connally v. General Construction Co., supra,* at page 393.

What does "willfulness" mean in the present situation? Naturally, trucking companies are charged with knowledge of the Regulations of the Interstate Commerce Commission. The problem that trucking companies are faced with in the above Regulation, is not lack of warning of the fact of the Regulation but rather that the requirements of the Regulation are so uncertain that no trucking company can determine with reasonable certainty, or in exercise of reasonable prudence, whether the picking of one route or another will expose it to criminal penalties.

The transportation of explosive and inflammable liquids by truck is perfectly legal and, in fact, is recognized as essential to our economy generally. The Interstate Commerce Commission has promulgated clear rules as to the packaging of such dangerous articles and the marking of the vehicles used to transport them. Such regulations must certainly be complied with and are not here in question.

When we come to the Regulation which is involved in this appeal, however, an entirely different question is presented. The facts of the present case as set forth in the indictment graphically present the problem.

Here the petitioner is charged with a crime in that in the course of transporting certain chemicals to Brooklyn, New York, petitioner's truck entered the Holland Tunnel, a vehicular crossing under the Hudson River, alleged in the indictment to be "a congested thoroughfare", when the indictment alleges that "there were other available and more

practicable routes for the transportation of said shipment." (R. 2).

Judicial notice may well be taken of the fact that it is physically impossible for a truck to go from Jersey City, New Jersey, to Brooklyn, New York, by any route at all without at some points "driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts * * *." (49 C. F. R. 238, 1949 Ed., Sec. 197.1 (b)).

The prohibition in the Regulation is not against entering or driving into such places. It is against entering or driving into them only when it is "practicable" or "feasible" to pick a route avoiding such places. No possible route could have avoided all such places.

In the present condition of our highways and of traffic in our cities it is, of course, impossible for an over-the-road trucker in almost any part of the United States to avoid *in toto* "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." In its very essence, the question before a court and jury would come down to a question, not as to whether a route is free from all of such places, but rather whether it is more free of them than another route. The Regulation becomes not a definite prohibition but a "more or less" prohibition with no standards set forth in the Regulation itself. The Court of Appeals itself recognized that the issue would not be one of choosing a route free of all the objectionable features, but one which would have been *more* free than the others. That Court said that an individual

> "will ordinarily have little difficulty in determining which of two or more practicable and feasible routes involves the *fewest* congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination." (R. 24) (Italics supplied).

The indictment itself also recognizes the "more or less" nature of the prohibition. It does not allege that there was a route which would not have led through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." Rather, it alleges that the defendant is guilty of a crime because it chose a particular route when there were "other available and *more practicable*" routes for the transportation of the shipment. (R. 4).

Who is to determine which of several routes is more practicable or feasible than another? Is the George Washington Bridge across the Hudson River with its viaduct approaches more feasible than a tunnel without viaduct approaches? Shall a truck go along street car tracks and avoid a tunnel, or go through a tunnel and avoid street car tracks? Should it go along trolley tracks to a crowded ferry, or shall it avoid the tracks and ferry and use a tunnel? Nowhere in New York City, en route to Brooklyn could a truck go without driving into or through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings." No standard is set up to establish what may be

considered as more "practicable" or more "feasible". The Court of Appeals recognized that a choice between two evils would have to be made by the trucking company when it said (R. 24):

> "In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination."

The Court of Appeals seemed to feel that the mere fact that a "factual determination" had to be made by a defendant did not necessarily invalidate a statute or regulation. This, of course, is correct. But it is necessary that the standards by which that factual determination is to be made should be laid down in the regulation of statute so that the defendant, by the exercise of ordinary judgment, can reach a factual determination under the standards laid down.

If this Regulation is allowed to stand in its present form, no trucking company can, without subjecting itself to criminal penalties, enter any urban community, since no standard is set up to guide a jury in determining what is meant by "practicable" and "feasible" in the Regulation.

The result would follow that there will be an after-the-fact determination—probably depending upon the location of an accident—as to whether one route would have been more practicable or feasible than another. If the fire which is referred to in Count 1 of the indictment had occurred on a crowded ferry in New York Harbor or the congested thoroughfare of a bridge crossing the Hudson River, the defendant then undoubtedly would have been met with a

charge that the route selected by it was improper and not as practicable or feasible as the route which it took.

If the regulation had prohibited specifically entering tunnels, the duty would have been clear. It did not do so. It made the trucking companies elect, at their peril, between various routes, any one of which could be alleged to have been an improper route, subject to a later determination as to whether it was more or less feasible and practicable than another route. A trucking company would have to indulge in conjecture as to which route to take, for no possible route would be free from attack under the vague admonitions of the Regulation.

In *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, this Court considered the constitutionality of a state statute which prohibited combinations in restraint of trade but subject to the following proviso:

> "provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed."

This Court in holding the statute unconstitutional stated:

> "Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not other-

wise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *Cohen Grocery* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this Court refused to allow as a proper standard of criminality in *International Harvester Company* v. *Kentucky*, 234 U. S. 216, 232, 233 (at p. 457).

* * * * * *

"But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act." (at p. 465).

The evil of uncertainty lurking within the framework of the Regulation, however, is not confined to the expression "so far as practicable and where feasible." It extends as well to the places prohibited to drivers of motor vehicles transporting explosives, etc., namely, "congested thorough-

fares." "places where crowds are assembled" and "dangerous crossings."

These expressions are all relative. They are not susceptible of a common interpretation. Population, place and circumstances conspire to defeat their use as ascertainable standards for the guidance of those admonished by the Regulation. A congested thoroughfare in a small village would compare favorably with one practically deserted in a large municipality. Furthermore, the degree of congestion intended by the Regulation is left entirely to conjecture and could not possibly be estimated by reference to any standard expressed or inferred therein. A thoroughfare that may seem congested to one driver may not be so regarded by another or a jury.[1]

The same argument is equally applicable to "places where crowds are assembled". That expression may readily be comprehended within the questionable meaning of "congested thoroughfares" but its appearance separately in the regulation denotes an intention to attribute to it a different interpretation. But what impression was its use

1. Particularly interesting on this point is the decision in the case of *United States* v. *Capitol Traction Co.*, 34 App. D. C. 592, where the court struck down a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding." In its decision the court said (p. 596):

> "The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what shall constitute a crowded car. This important elemen' cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment."

in the regulation intended to convey to drivers? The word "crowd" may consist, in one circumstance, of a half dozen people, and in another of hundreds or thousands depending upon such variable standards as space, location and population. Obviously there is a total lack in the Regulation of any definition or inference of what constitutes a "place where crowds are assembled" and hence there is no standard to guide those intended to be governed thereby.

Similarly, the phrase "dangerous crossings" is afflicted by the same absence of clarity and definiteness and consequently, must be judged by the same rule of statutory construction.

The test which has consistently been adopted by this Court to determine whether a criminal statute complies with the constitutional requirements is whether it uses terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." *Connally* v. *General Construction Company, supra* (at p. 391). Judged by this test, the regulation here involved fails to meet the necessary standard.

The Court below based its opinion, in part, upon the decision of this Court in *Sproles* v. *Binford*, 286 U. S. 374. In that case the Court considered, in an equity proceeding, the validity of a statute limiting the weight and load of vehicles on the highways unless they were being used to transport property to the "nearest practicable common carrier" or from such carrier to destination via the "shortest practicable route". These phrases laid down the standards with which men of ordinary intelligence could comply. The "nearest practicable common carrier" is readily ascertainable by reference to a route chart or map.

Likewise, the expression "shortest practicable route to destination" requires no more than the exercise of ordinary judgment and practical experience. The text of the statute in that case affords a definite standard of conduct which is wholly lacking in the Regulation now under consideration.

In the Court below, an endeavor was made to uphold the Regulation upon the basis of the decisions in *The Benton*, 51 Fed. 302 (1892) and in *United States* v. *Wise*, 7 Fed. 190 (1881). The statute considered by the Court in those cases prohibited the transportation of inflammable articles, including refined petroleum, on passenger vessels, but provided that such articles "may be carried on board such steamer upon routes where there is no other practicable mode of transporting it, under such regulations as shall be prescribed by the Board of Supervising Inspectors, with the approval of the Secretary of the Treasury". In that case, the exception to the prohibition in the statute was definite. It was something which could be determined as a matter of fact. It would have been the same as if in this case the Regulation had provided that inflammables could not be transported through a tunnel unless there was no other practicable way of the cargo reaching its destination. In the present case, however, the prohibition did not have this definiteness. The trucker would have to determine at his peril which of several alternative routes—through a tunnel, over a viaduct, or on congested thoroughfares—was to be selected with no standards set down by which he was to decide which route should be followed.

If we assume from the language of the indictment that the Government contends that there are "other available and more practicable routes", or if we take the decision of the Court of Appeals that the Regulation requires a trucker to choose a route with "the fewest" congested thoroughfares, etc.—then the question of practicability descends to the level of degree. Thus if the driver used what he considered the "most practicable" route, he still would be subject to prosecution if an enforcement agent or a jury conceived another route to be "more practicable". How infinite can conjecture or guessing become in order to meet the questionable intent of a vague regulation?

The statute requires the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives and other dangerous articles. They have not met the obligation of the statute by issuing a regulation which is in such general terms that no reasonable businessman can determine from the language of it what he should do or should not do in prearranging a route.

Conclusion.

The Regulation upon which the offense is charged in each of the first, third and fifth counts of the indictment is void on its face since it fails to set a reasonable standard by which a citizen may be apprised of the conduct required of him.

Therefore, it is respectfully urged that this Court reverse the decision of the Court of Appeals for the Third Circuit and direct that Counts 1, 3, and 5 of the indictment be dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

It is not contended that the possible existence of borderline cases makes a regulation unconstitutional. The regulation, to be constitutional, must, however, set forth a standard by which a person may be able to determine where the border exists. The present regulation contains no such standard.

Respondent has misconceived the issue in this case. The issue is not whether the words "practicable" and "feasible" would by themselves create a lack of certainty

in the statute. Nor does petitioner contend the possible existence of borderline cases makes a law constitutionally indefinite.

The problem presented by the Regulation which is involved in the present case is that there is no test by which one is to judge the sense in which "practicable" and "feasible" are used in the Regulation. The lack of certainty inherent in the Regulation is pointed up by the fact that the Court below, the Respondent, and the Port of New York Authority as *amicus curiae*, construe the Regulation in three different ways:

(1) The Court of Appeals, in its opinion, indicated that the test under the Regulation is that a trucker should select a route which had the "*fewest* congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." (R. p. 24; italics supplied.) Under this test, the defendant could prevail at the trial if it could show that by going through the tunnel it was taking the route which involved *less* congested thoroughfares, viaducts, places where crowds are assembled, etc. This would be a quantitative test—which of the routes has *less* of the proscribed places.

(2) On the other hand, the Respondent takes the position that a Regulation such as this "will be held to punish only wilful and negligent failure to consider the factor of safety." (Brief, p. 10; see also Brief, p. 24 "whether the *safest* route is also commercially feasible.") Under this test it is not the quantity of the proscribed places but the quality that would be determinative, *i.e.*, a ferry might *per se* be less dangerous than a tunnel even though the selection of the ferry might involve the truck in going through more congested areas, where crowds were assembled, than would the tunnel.

(3) The Port of New York Authority, as *amicus curiae*, then takes an entirely different position. It

apparently contends that the use of the tunnel was *ipso facto* a violation of the Regulation.

> "* * * use of the Holland Tunnel particularly at the height of the morning rush hour could never be considered an alternative open to a driver of a truckload of highly inflammable liquids and no such driver can possibly be heard to say that he didn't know that the Interstate Commerce Commission regulation intended to exclude such a cargo from such a tunnel." (*Amicus curiae* brief, p. 20.)

With a natural affection for their own tunnel, they take the position that the Regulation means that such a trucker may never use a tunnel.

We have, therefore, in the opinion of the Court below, and in the briefs filed on this appeal, three different and distinct interpretations as to what was intended by the Regulation. This would in itself seem to be a fairly conclusive indication of the inherent lack of ascertainable standard in the Regulation.

Both the Respondent and the Port of New York Authority have gone outside the record to refer to a so-called "explosives ferry" operated across the Hudson River by the Delaware, Lackawanna & Western Railroad. Certainly, the ferry was a "practicable" route in the sense that it was available and commercially possible. But if the test intended to be applied by the Regulation is that of "safety" or the quantitative test of going through the least number of congested areas, then the trucker would have to take into consideration the fact that this ferry leaves from the same ferryslip in Hoboken at which passenger ferries are constantly loading and unloading vast throngs of humanity, that it leaves from the most congested thoroughfare of Hoboken and goes to a most congested area in New York.

In making a determination under such a test, the trucker would have the right to consider that there are no pedestrians in the Holland Tunnel; that the tunnel has fire-fighting equipment stationed every few hundred yards and is continually patrolled by special police on a catwalk.

The damage caused by the fire in the Holland Tunnel was probably inconsequential compared to the disaster which might have been caused to the Port of New York and the communities surrounding it if the fire which is alleged to have started in this truck, had broken out while the truck was entering upon an explosives ferry which was loaded with dynamite or other explosives, and the inflammables on the truck were thereby brought into immediate proximity to a concentration of dangerous explosives on the ferry.

If the Regulation had directed a trucker to take the "safest" practicable route, all of these factors could be submitted to a jury so that they could determine whether the judgment of the trucker in choosing the tunnel route rather than the ferry route was a proper one or whether it was not a proper one. Individuals or juries might differ as to the conclusion to be reached from the facts, but they would have a standard set before them—"safety"—by which to judge the evidence and reach a conclusion.

But in the present Regulation, there is no such standard. The trucker is directed to pick a route which will avoid "(A)", "(B)", "(C)", and "(D)" "so far as practicable, and, where feasible." Of course, if he can avoid all of them, no problem arises. The problem arises where he can avoid some of them but not all of them. What is the standard to be used to determine whether to take a route which avoids "(A)" and does not avoid "(B)"?

Under the quantitative test of the Court of Appeals, the trucker would be justified in going through "(A)" if

his only alternative had been to go through "(B)" plus "(C)". Under the qualitative test urged by the Respondent, the trucker would not be justified in going through "(A)" unless it was safer than going through a combination of "(B)" plus "(C)". Under the absolute test urged by the Port of New York Authority, a trucker would never be justified in going through "(A)" if "(A)" was a tunnel.

Thus, the words "practicable" and "feasible" in the context of the present Regulation are indefinite and there is no standard by which performance is to be judged. This does not mean that a Regulation is indefinite merely because it may be difficult to make a judgment; it means that somewhere in the Regulation the nature of the judgment to be reached should be set out so that men of ordinary intelligence can know, before the event, what they were supposed to decide. Under the present Regulation, no matter where in any urban community the fire occurred, the trucker could be faced with the charge that he had violated the Regulation because there was another commercially "practicable" and "feasible" route to the place where he was going—as there always would be.

In the cases previously before this Court and relied upon by the Respondent, and by counsel for the Port of New York Authority, the problem was quite different. In those cases, there would be one determination to be made by a party, subject only to a subsidiary determination as to the practicability of that determination. Thus, in *Sproles* v. *Binford*, 286 U. S. 374, the question was as to the constitutionality of certain Texas penal provisions prohibiting the operation on any highway of any vehicle exceeding stated limitations of size and weight except

> "when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier

unloading point by way of the shortest practicable route to destination; * * *"

This fixed a standard for the trucker to follow—he was to go only by the shortest route, provided that route was "practicable." The shortest route was susceptible of definite determination. The practicability of a route was a matter for ordinary business judgment.

In the present case, the issue is not as to the "practicability" of alternative routes from a mechanical or commercial standpoint. Certainly, there are always alternative practicable routes from that standpoint. Undoubtedly, the trucker in the present case could have used a bridge with its accompanying viaducts or a ferry with its accompanying places where crowds are assembled. If he had used them and a fire had developed and people had been injured and property destroyed, to what standard could he appeal to show that the route he took was one which did not carry with it the criminal penalties of the Regulation? He had chosen a route which entered one of the proscribed places; and there were other alternative routes which, it is true, might also enter proscribed places. The inherent vice in the present Regulation is that no matter what route the trucker took, it could be charged after the event by a Grand Jury, as it was in the present case, that there was a "more practicable" route (R. p. 2) with no test as to what in these circumstances is to determine what is meant by more or less "practicable."

Respondent, in its brief (p. 34), states:

> "If all available routes are congested there would be no problem of choice. Necessity of a judgment as to practicability comes only when one is congested and another is not."

The brief then goes on to state:

> "As between the Lincoln Tunnel and the Holland Tunnel no choice is required. But both are to be avoided if practicable which might be the case if there is an available ferry."

This, as can be seen, begs the question inasmuch as the ferry itself and the entrance to the ferry and the exit from the ferry are just as congested as the tunnel.

Certainly, if this Regulation is construed to mean that a defendant could not be convicted if all available routes are over "congested thoroughfares", then no problem would arise under the Regulation. This, however, is not the standard fixed in the opinion of the Court below or, apparently, in the indictment in this case. The opinion of the Court below indicates that if there is a choice of going through various proscribed areas, then a quantitative determination must be made by the trucker as to which has the "fewest" of the proscribed places (R. p. 24). The indictment does not allege that it was possible for the trucker to go by a route which avoided all of the proscribed places. It merely alleges that there was a "more practicable" route (R. p. 2).

We have, therefore, a situation where a determination as to practicability of alternative routes going through proscribed places must be made by the trucker with no standard set by which he is to determine the sense in which "practicability" is used. Under the construction given to the Regulation by the Court of Appeals, the Regulation does not contain a sufficiently ascertainable standard of guilt.

II

It is neither difficult nor impossible to draft a regulation which imposes standards of reasonable certainty.

The argument is made by the Respondent that if the present Regulation is unconstitutional, no possible regulation could be drawn by the Interstate Commerce Commission which would carry out the instructions of Congress to "formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles." This is not correct.

The present Regulations, as Respondent shows in its brief, have frequently been amended and, presumably, they could be amended in the future.

It is not for petitioner to formulate regulations for the Interstate Commerce Commission but it perhaps should be pointed out that the state legislatures have met a similar problem very easily by fixing a standard by which the conduct of the trucker is to be judged. New York and New Jersey have both, within the present year, passed statutes (referred to in Respondent's brief, p. 41) relating to vehicular crossings of the Hudson River. These statutes provide:

> "'No person shall transport in or upon a vehicular crossing, any * * * inflammable or combustible liquids, * * * at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property."

These statutes fix a standard, well known in the law, of "reasonable care." The Regulation of the Interstate

Commerce Commission has no such standard. No matter what route is taken, and no matter what care is shown in choosing between various proscribed places on different routes, a trucker could be convicted if a jury should hold (as the Grand Jury has charged in the present case) that there was another "*more* practicable" route, with no standard fixed to determine what, in the light of the Regulation, is to be considered a more or less "practicable" route.

III

The Regulation is not given certainty by the fact that only one who "knowingly" violates it can be punished.

The Respondent contends that the word "knowingly" adds certainty to a Regulation which might otherwise be deemed uncertain. The Respondent states:

> "We contend that the words 'knowingly violates' will permit punishment only for a wilful or reckless failure to consider the factor of safety in the selection of a route for the motor transport of explosives and inflammables." (B. p. 42).

There is no such provision in the Regulation. It does not state that the "factor of safety" is to be the test used to determine the practicability of a route. If it did, the trucker could establish that in good faith it determined that the tunnel had more factors of safety than a ferry crowded with high explosives.

We must, therefore, consider what the word "knowingly" means. The Respondent admits that "knowingly" is a word of "differing meanings", depending upon the context in which it is used.

> "'Knowingly' is a word of differing meanings depending on the context in which it is used. We do not suggest that 'knowingly violates' as used in 18 U.S.C. 835 should always be construed to require more than a mere intent to do an act prohibited by the regulations." (B. p. 42)

In the present situation, the trucker is charged with knowledge of the Regulations. The trucker knew that his truck was going through the tunnel. He knew that there were other routes. He also knew, however, that any alternative route which he took would involve either "viaducts", "congested thoroughfares", "places where crowds are assembled", or "dangerous crossings." He therefore knew the facts. But there was no standard by which he was to determine which of the alternative routes he could legally take.

"Knowingly", as used in the statute, means no more than a knowledge of the Regulations and the facts. The Respondent is wrong in urging

> "* * * 'knowingly' implicitly means a specific criminal intent or at least such a reckless disregard of consequences as will enable prosecutors and courts to distinguish honest mistakes in judgment from criminal conduct." (B. p. 42.)

Respondent is attaching the same significance to the word "knowingly" as would be attached to the word "wilfully." The word "wilfully" means more than "knowingly". It means that there must be an evil design or bad purpose also present. *Felton* v. *United States*, 96 U. S. 699, 702; *Potter* v. *United States*, 155 U. S. 438, 446; *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69, 71 (C.C.A. 8th, 1909).

As was pointed out in the majority opinion of this Court in *Screws* v. *United States*, 325 U. S. 91, at 101, the use of the word "'wilful" means that

> "* * * something more is required than the doing of the act proscribed by the statute * * *. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime * * *. And that issue must be submitted to the jury under appropriate instructions."

It is for this reason that this Court in that case felt

> "* * * that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." (p. 101)

But where criminal penalties flow from a "knowing" violation of a Regulation, the question of "evil intent" does not arise. Knowledge of the Regulation and of the act done—if it is a prohibited act—is sufficient to result in a conviction. This makes it, therefore, all the more necessary that there be certainty in this Regulation so that a trucker charged with the duty of complying with the Regulation may know what standard he is supposed to employ in making a determination as to whether the choice made by him is prohibited or is not prohibited.

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

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OCTOBER TERM, 1951

BOYCE MOTOR LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 24-29) is reported at 188 F. 2d 889.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1951 (R. 30). On May 25, 1951, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton to and including July 2, 1951 (R. 32), and the petition was filed on that date. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

By regulation of the Interstate Commerce Commission, drivers of motor vehicles transporting, *inter alia*, any explosive or inflammable liquid, are required "to avoid, so far as practicable and, where feasible, by prearrangement of routes," driving through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." By 18 U.S.C. 835, whoever "knowingly" violates such regulation is punishable. The question presented is whether an ascertainable standard of guilt is prescribed within the requirements of the Fifth and Sixth Amendments to the Constitution.

STATUTE AND REGULATION INVOLVED

18 U.S.C. 835:

> The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common car-

rier engaged in interstate or foreign commerce by land or water.

* * * * * *

Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

49 C F R (1949 Ed.) § 197.1 (b):

Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings.

STATEMENT

In an indictment returned by a grand jury for the District of New Jersey, petitioner was charged, in the three counts here in question (counts 1, 3, and 5, R. 2-3, 4-5, 6-7), with having "unlawfully and knowingly" caused its driver, en route from Cascade Mills, New York, to Brooklyn, New York, to drive a truck containing an inflammable liquid, carbon bisulphide, "into the Holland Tunnel, a congested thoroughfare." The dates of the offenses were charged as on or about April 7, April 8, and May 13, 1949, respectively, and it was further

charged that "there were other available and more practicable routes" and that petitioner "well knew that the transportation * * * into the said Holland Tunnel was in violation of the regulations." Count 1 also charged that on May 13, carbon bisulphide, of a gross weight of 48,536 pounds, flamed and exploded in the Holland Tunnel and that as a result of petitioner's violation bodily injuries were caused to approximately 60 persons.

The District Court dismissed the three counts (R. 17) on the ground that the regulation did not fix an ascertainable standard of guilt (R. 10-11). He found that intent was not made an element of the offense (R. 13). The Court of Appeals for the Third Circuit, in a unanimous decision, reversed the order of the District Court (R. 30), holding that the regulation, read with the statute, requires a wrongful intent to evade the regulation (R. 26) and that, so construed, the regulation establishes a standard of guilt that is reasonably certain (R. 27-28).[1]

---

[1] The counts here in question and the additional counts 2, 4, and 6, further charged operations without signs, marks, or placards on the vehicle, as required under Interstate Commerce Commission regulations in the case of dangerous shipments. The District Court found counts 1, 3, and 5 ambiguous by reason of the inclusion of charges as to the lack of markings (R. 14), but the Court of Appeals found that the additional charges constituted only surplusage of a non-prejudicial nature (R. 28-29). This matter is not raised in the petition for a writ of certiorari (see Pet. 5-6). Petitioner moved in the District Court for dismissal of counts 2, 4 and 6, which charged operations without the required markings. The District Court found the contention of ambiguity without merit as to these counts and denied the motion to dismiss as to them (R. 15).

To support its contention that the regulation here in question affords no ascertainable standard of guilt, petitioner sets forth the possible difficulty in determining the least dangerous route for shipment of explosives and argues its point on the assumption that it has been indicted for an honest error of judgment. Such, however, is not the case.

The statute punishes any one who "knowingly" violates the regulation, and the indictment alleges that petitioner caused its driver to use a congested thoroughfare when there were other available, practicable routes, well knowing that the route it selected was in violation of the regulation. Thus, in essence, the statute punishes, and the indictment charges, not a mere honest error of judgment, but a wilful failure to consider the factor of safety in selecting a route.

Thus understood, it becomes clear that the regulation in question fixes a standard of guilt sufficient to meet constitutional requirements. The difficulties set forth by petitioner are no greater than those commonly involved in complying with a number of criminal statutes that have been upheld in decisions of this Court, the Court pointing out that requirements of compliance that are perhaps vague in their literal terms are to be tested by proper reference to the common usage and understanding to which the requirements relate.[2] In

[2] *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U.S. 86, 108-111 (contracts and arrangements "reasonably calculated" to fix

Omaechevarria v. *Idaho*, 246 U.S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503; *United States* v. *Ragen*, 314 U.S. 513, 524; and *Screws* v. *United States*, 325 U.S. 91, 101-103 (*supra*, fn. 2), this Court has further pointed out that, since it is necessary to a conviction that there be a guilty state of mind as well as the intent to do

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prices, and acts which "tend" to accomplish the prohibited results); *Nash* v. *United States*, 229 U. S. 373, 376-378 (conspiracy in restraint of trade and to monopolize trade); *Miller* v. *Strahl*, 239 U.S. 426, 434 (hotel keepers required, in case of fire, to "do all in their power to save such guests"); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348 (grazing sheep "upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle"); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503 (selling meat upon false representation that it is "kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements"); *United States* v. *Alford*, 274 U.S. 264, 267 (building a fire "near" forest or inflammable material upon the public domain); *Bandini Co.* v. *Superior Court*, 284 U.S. 8, 17-18 (an "unreasonable waste" of gas where it "has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion"); *Sproles* v. *Binford*, 286 U.S. 374, 392-393 ("nearest practicable common carrier receiving or loading point", by "shortest practicable route," and "point equipped to transport such load"); *United States* v. *Ragen*, 314 U.S. 513, 522-524 ("reasonable" allowance for salaries in determining question of willful evasion of tax); *Screws* v. *United States*, 325 U.S. 91, 101-103 ("willfully" depriving any person "under color of any law" of "any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States"); and *United States* v. *Petrillo*, 332 U.S. 1, 6-8 (forcing employment of persons at a broadcasting station "in excess of the number * * * needed by such licensee to perform actual services"). And see citations applied by analogy in deportation for "moral turpitude." *Jordan* v. *De George*, 341 U.S. 223, 231, fn. 15. Cf. the earlier decisions relied upon by petitioner, *Connally* v. *General Construction Co.*, 269 U.S. 385 (requirement of payment of wages at the "current rate of per diem wages in the locality"), and *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 ("unjust or unreasonable rate or charge in handling or dealing in or with any necessaries").

the specific act, no offender would be without warning of the criminality of his act and no offender would be convicted upon a mere honest error of judgment.[3]

We do not suggest that "knowingly" as used in 18 U.S. Code 835 should always be construed to require something more than an intent to do an act which is prohibited by the Commission's regulations for the transportation of explosives. For example, since compliance with the Commission's regulations as to smoking, fireproof bulkheads, and electric lights (49 C.F.R. 197.1(e), 197.2(b) and (f)) would involve no exercise of judgment, one "knowingly violates" such regulations merely by deliberately engaging in the prohibited conduct. However, where compliance with the regulation involved requires the exercise of a reasonable judgment upon complicated facts, "knowingly" inherently means a specific criminal intent or at least such a reckless disregard of consequences as will enable prosecutors and courts to distinguish honest mistakes in judgment from criminal conduct.

18 U.S.C. 835 constitutes a mandate that "[t]he Interstate Commerce Commission shall formulate regulations for the safe transportation * * * of explosives and other dangerous articles, includ-

[3] Where a difficult determination is required in order to ascertain what will constitute compliance, this Court has repeatedly held that a guilty state of mind is required as an element of the crime. *Felton* v. *United States*, 96 U.S. 699, 703; *Potter* v. *United States*, 155 U.S. 438, 446; *United States* v. *Murdock*, 290 U.S. 389, 396.

ing flammable liquids * * *." It is manifest that the Commission cannot prescribe the specific route for each dangerous shipment in the United States. Moreover, if the Commission could prescribe such routes it still could not prevent a shift of the public from other routes to the routes designated for dangerous traffic. The inability to prescribe a standard with absolute mathematical precision does not, however, permit the Commission to abdicate its function.

What the Commission has required is an honest effort to avoid the use of congested thoroughfares "so far as practicable, and, where feasible." In most cases, as pointed out by the Court of Appeals (R. 28), this will not involve a difficult determination, for the choice between routes will not be close. But even if choice is difficult, there cannot be a complete absolution from the duty to make a reasonable choice. An area of difficult choice cannot justify a choice dictated solely by considerations of speed or profit and in total disregard of safety.

Petitioner in effect asks this Court to take judicial notice, without evidence, of a conclusion that the New York area admits of no choice of thoroughfares. That argument does not tend to show that the regulation is indefinite. All it would prove is that the decision required by the regulation has been honestly made. If petitioner's contention in this respect were valid, it would have a defense which it should prove before a jury upon the basis

of evidence, rather than as an alleged matter of common knowledge or judicial notice.[4]

CONCLUSION

The judgment below is correct and no conflict of decisions is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1951.

[4] Petitioner argues, for example (Pet. 7), as if the viaducts of the George Washington bridge would constitute the only alternative to the tunnel in which the explosion took place. But if the matter is to be tried upon mere allegations of purported common knowledge, this Court could as properly take judicial notice that the D.L. & W. railroad operated a special explosives ferry from Hoboken, New Jersey, to New York City (See I.C.C. No. 3681, Ferry Tariff, No. 15, D.L. & W. R.R. Co., between New York, N.Y. and Hoboken, N.J., effective May 27, 1939 to September 1, 1949). Before petitioner's argument against use of the bridge is accepted as decisive of the matter, the availability of the ferry and of possible other alternative routes would require full presentation in evidence.

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No. 167

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In the Supreme Court of the United States

OCTOBER TERM, 1951

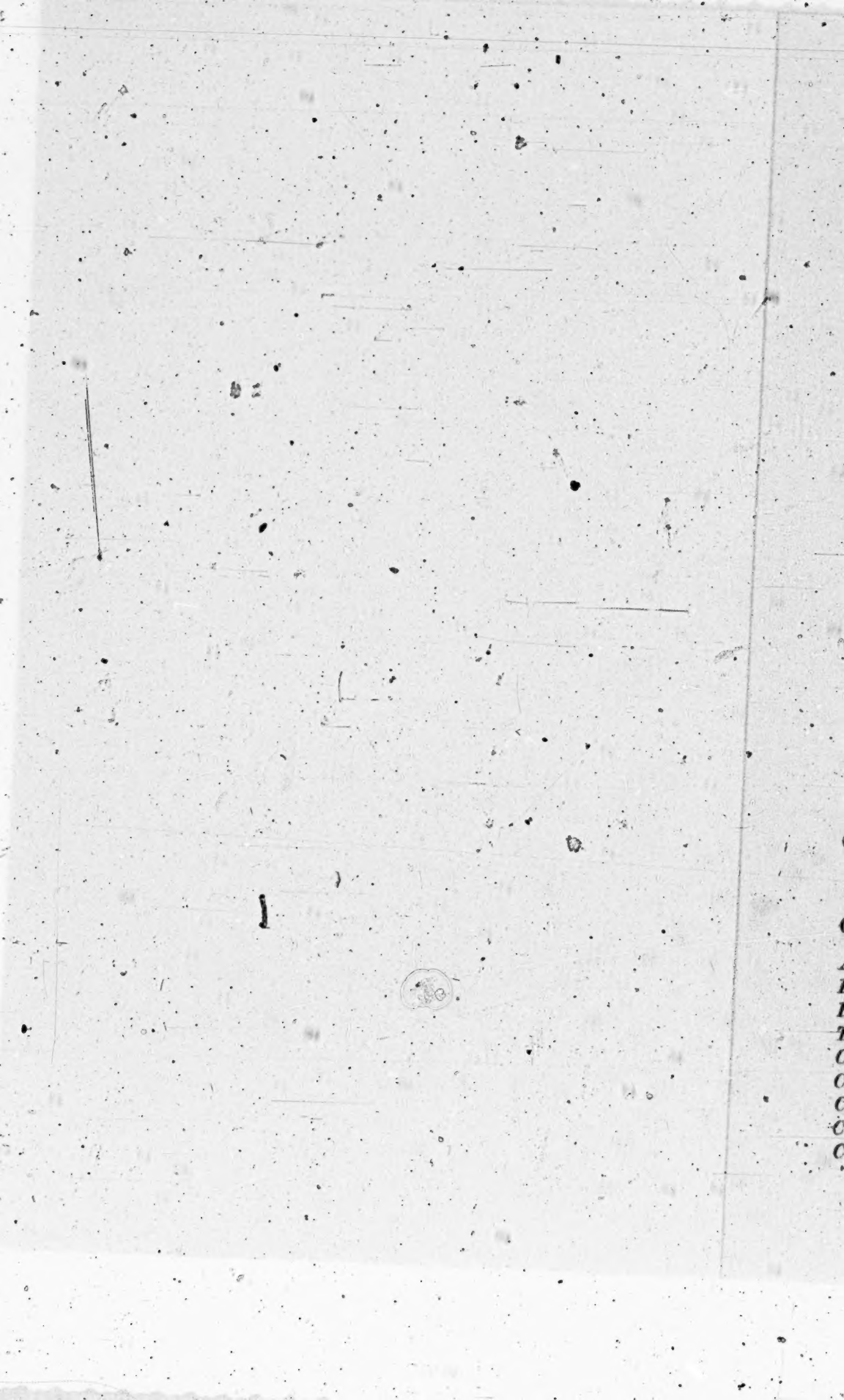
BOYCE MOTOR LINES, INC., PETITIONER,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES



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OPINIONS BELOW

The opinion of the Court of Appeals (R. 20-25) is reported at 188 F. 2d 889. The opinion of the District Court (R. 7-13) is reported at 90 F. Supp. 996.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1951 (R. 26). On May 25, 1951, the time for filing a petition for a writ of certiorari was extended by order of Justice Burton to and including July 2, 1951 (R. 28), and the petition

was filed on that date. The petition was granted on October 15, 1951 (R. 29). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

By regulation of the Interstate Commerce Commission, drivers of motor vehicles transporting certain dangerous substances, including inflammable liquids, are required to "avoid, so far as practicable, and, where feasible, by prearrangement of routes," driving through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." By 18 U.S.C. 835, whoever "knowingly violates" such a regulation is punishable. The question presented is whether an ascertainable standard of guilt is prescribed within the requirements of the Fifth and Sixth Amendments.

STATUTE AND REGULATION INVOLVED

18 U.S.C. 835:

> The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all ship-

pers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

The commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions.

Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport.

Such regulations, as well as all changes or modifications thereof, shall, unless a shorter time is authorized by the commission, take effect ninety days after their formulation and publication by said commission and shall be in effect until reversed, set aside, or modified.

In the execution of sections 831-835 of this title the Interstate Commerce Commission may utilize the services of the Bureau for the Safe Transportation of Explosives and Other Dangerous Articles, and may avail itself of the advice and assistance of any department, commission, or board of the Government; but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law.

Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any per-

son results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The pertinent regulation of the Interstate Commerce Commission is 49 C.F.R. (1949 ed.) 197.1 (b):

> Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings.

STATEMENT

In an indictment returned by a grand jury for the District of New Jersey, petitioner was charged, in the three counts in question (counts 1, 3, and 5; R. 1-6), with having "unlawfully and knowingly" caused its driver, en route from Gascade Mills, New York, to Brooklyn, New York, to drive a truck containing carbon bisulphide, an inflammable liquid, "into the Holland Tunnel, a congested thoroughfare." The dates of the offenses were charged as on or about May 13, April 7, and April 8, 1949, respectively, and it was further charged that "there were other available and more practicable routes" and that petitioner "well knew that the transportation * * * into the said Holland Tunnel was in violation of the regulations." Count 1 also charged that on May 13, carbon bisulphide, of a gross weight

of 48,536 pounds, flamed and exploded in the Holland Tunnel while being transported on petitioner's truck, and that as a result of petitioner's violation bodily injuries were caused to approximately 60 persons.

The District Court issued an order dismissing the three counts (R. 13) on the ground that the regulation did not fix an ascertainable standard of guilt (R. 8-9). It found that intent was not made an element of the offense (R. 10). The Court of Appeals for the Third Circuit, in a unanimous decision, reversed (R. 26), holding that the regulation, read with the statute, requires a wrongful intent to evade the regulation (R. 22) and that, so construed, the regulation establishes a reasonably certain standard of guilt (R. 23-24).[1]

SUMMARY OF ARGUMENT

Petitioner asserts that the Interstate Commerce Commission's regulation governing the routing of motor vehicles transporting explosives, inflamma-

[1] The counts in question and the additional counts 2, 4, and 6, further charged operations without signs, marks, or placards on the vehicle, as required under Interstate Commerce Commission regulations in the case of dangerous shipments. The District Court found counts 1, 3, and 5 ambiguous by reason of the inclusion of charges as to the lack of markings (R. 11), but the Court of Appeals found that the additional charges constituted only surplusage of a non-prejudicial nature (R. 24-25). This matter was not raised in the petition for a writ of certiorari (see Pet. 5-6). Petitioner moved in the District Court for dismissal of counts 2, 4 and 6, which charged operations without the required markings. The District Court found the contention of ambiguity without merit as to these counts and denied the motion to dismiss as to them (R. 11-12).

ble liquids and other dangerous articles is rendered unconstitutionally vague and uncertain by the use of the phrases "so far as practicable", "where feasible", "congested thoroughfares, places where crowds are assembled" and "dangerous crossings."[2] We contend that the regulation clearly establishes an ascertainable standard of guilt satisfying the Fifth and Sixth Amendments.

I

The Transportation of Explosives Act of 1908 as amended, 18 U.S.C. 835, directs the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives and other dangerous articles including flammable liquids which will bind all carriers in interstate commerce. Pursuant to the statute, the commission promulgated regulations applicable to railroads in 1908 and to motor carriers in 1934 which, as amended, are in force today.

The 1934 regulations contained a provision

[2] The petition for certiorari relies only upon the phrases "so far as practicable" and "where feasible" as rendering the regulation unconstitutionally indefinite. Petitioner's brief asserts that similar uncertainty is injected into the regulation by the other phrases referred to above (Pet. br. pp. 15-17). In the following discussion, we show that the regulation is not rendered invalid because the carriers' duty to provide for the safe routing of explosives and inflammables is necessarily expressed in a general standard which employs the phrases "so far as practicable" and "where feasible". We believe that the same reasoning will support *a fortiori* the description of the places to be avoided by such meaningful phrases as "congested thoroughfares, places where crowds are assembled" and "dangerous crossings".

which directed drivers of vehicles containing explosives or inflammables to avoid congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings "as much as possible." In 1940, after extensive hearings and opportunity for all motor carriers to comment upon drafts, the regulations, including what was to become Section 197.1(b) were revised. That section was amended so as to direct drivers to avoid the places mentioned "as far as practicable" and to accomplish this "so far as practicabl " by prearrangement of routes. The regulation was amended to its present form in 1942. In this form, it has been apparently acceptable to the carriers until the present controversy arose.

II

The regulation here involved is sufficiently certain to meet the due process requirement that those affected know what acts are criminal.

The words "practicable" and "feasible" which are the principal basis of petitioner's criticism are defined in Webster's dictionary in such a way that they could not be ambiguous in the context of the regulation. The expression "so far as practicable, and, where feasible" clearly means "capable of being put into practice successfully or reasonably" or "capable of being used successfully or reasonably." In other words, the carriers

are to avoid the places mentioned when they can do this successfully or reasonably.

This definition is consistent with the prior decisions. Thus, in a statute which forbade the carrying of petroleum on passenger steamers unless there was "no other practicable mode of" transporting it, the word "practicable" was held to mean commercially rather than merely physically or mechanically practicable. *United States* v. *Wise*, 7 Fed. 190. And in *Sproles* v. *Binford*, 286 U.S. 374, 393, the term "shortest practicable route" was held to be sufficiently certain in the light of common usage and interpretation.

Upon examination, the supposed difficulty in making the judgments required by the regulation disappears. The carrier is required to study available routes before it uses them to transport explosives and inflammables. If there is more than one route, it must determine whether one avoids the places mentioned to a greater extent than the others. This is no more than a prudent carrier of dangerous articles would do in the absence of the regulation. Petitioner is required to make only the type of judgments that carriers and even ordinary drivers make every day.

III

A study of the numerous decisions which have dealt with the problem of vagueness in criminal statutes bears out the conclusion that the regu-

lation is sufficiently certain. These decisions show clearly that the possible existence of borderline cases will not make a law unconstitutionally indefinite, as petitioner contends. As the Court pointed out in *Jordan* v. *De George*, 341 U.S. 223, 231, it has "several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness." Petitioner's required determination was no more difficult than that required in numerous other cases, for example the determination of whether one's sheep interfere with the "usual and customary use of [a] range," or whether one is coercing an employer to employ more persons than "needed." There are countless statutes, both state and federal, which require that a line be drawn between innocent and criminal conduct without being deemed constitutionally objectionable.

There are special reasons why the requirement of certainty should be relaxed under the facts of this case. As the cases show, the standard of required certainty varies with the seriousness of the evil to be prevented. That this regulation is applicable only to a few members of a highly specialized group is also a factor to be considered.

Furthermore, impossible standards of specificity are never required. Because of the impossibility of drafting a regulation which would specifically

point out the routes to be used under a great variety of conditions, the Commission was required to establish a general standard which can be applied in all places and under all circumstances. Otherwise, the legislative purpose would be completely frustrated. By their nature, explosives and inflammables must be handled with extreme care. The regulations to assure this quite naturally and frequently use general terms such as "practicable," "all possible precautions," "safe distance." The experience of legislatures in dealing with the problem of the safe routing of explosives and inflammables confirms that the Commission's establishment of a general standard is probably the only feasible method of regulation.

IV

Any possibility of uncertainty is obviated by the fact that 18 U.S.C. 835 punishes only one who "knowingly violates" the regulation. The meaning of the word "knowingly" must be determined in the context used. We submit that where a criminal regulation requires investigation and judgment, it will be held to punish only wilful or negligent failure to consider the factor of safety. Conversely, it will not punish an honest error in judgment.

The vice of an indefinite statute is that it places the accused on trial for an offense the nature of

which the statute does not define and of which it gives no warning. But it is a contradiction in terms to say that the accused suffers from lack of warning when he "knowingly violates" a statute. This is borne out by the decisions of this Court which have consistently refused to hold a statute constitutionally uncertain where scienter has been an element of the offense.

ARGUMENT

I

The Regulation at Issue Evolved from Earlier Regulations Which Have Been in Force Since 1934 and Were Adopted After Consultation with Representatives of the Industry Involved

We need dwell but briefly upon the compelling reasons for regulating the transportation of explosives and inflammables. No one can doubt the seriousness of the hazards involved. E.g., see 7 F.R. 7043 (1942); *Hughes Transp., Inc. Extension-Southeastern States,* 46 M.C.C. 603 (1946). The exactions of war compound the problem since they necessitate an "extraordinary increase in the production of explosives and other dangerous articles" and force action "to promote the safety of interstate or foreign transportation, of those who are employed in the movement thereof, and of the public generally." 8 F.R. 6481-6482 (1943).

Congress early recognized the need for safeguarding the public against the hazards of trans-

porting explosives. The Act of July 3, 1866, prescribed the conditions under which specified explosives were to be shipped in vehicles and vessels engaged in interstate and foreign commerce, and prohibited shipments in passenger vehicles and vessels. 14 Stat. 81. The act proved inadequate in the light of later developments, and a number of serious disasters occurred. The American Railway Association (now Association of American Railroads) established a bureau of explosives, but, since not all railroads were members of the bureau, it was unable properly to cope with the situation. These chaotic conditions promoted the passage of the Transportation of Explosives Act of March 30, 1908. 35 Stat. 554, codified and amended by Act of March 4, 1909, 35 Stat. 1134. On March 4, 1921, the act, originally applicable only to explosives, was extended to inflammables. 41 Stat. 1444. See generally, *Interstate Commerce Commission Activities 1887-1937*, pp. 137-138.

The portion of the act applicable to the present case is now codified as 18 U.S.C. 835 and is quoted in full at pp. 2-4, *supra*. It directs the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives and other dangerous articles, including flammable liquids, to be binding on all land common carriers in interstate commerce. It further provides that whoever "knowingly violates" a regulation will be fined not more than $1,000 or imprisoned for not

more than one year or both. In the event that death or bodily injury results, the maximum penalties are $10,000 fine or ten years' imprisonment or both.

Pursuant to these statutes, the commission in 1908 promulgated regulations applicable to railroads (Interstate Commerce Commission, 22d Annual Rep., p. 56), which, as amended, have been in effect ever since. These are now published as 49 C.F.R. (1949 ed.) Pts. 71-78.

The commission early realized that the statutes governing transportation of explosives were broad enough to cover highway carriers. See *Coordination of Motor Transportation*, 182 I.C.C. 263, 370 (1932). But it was not until 1934 that regulations were promulgated governing motor trucks and similar vehicles. These regulations were issued after extensive hearings and widespread publicity throughout the motor transport industry. Proposed regulations were served upon each of 2300 motor carriers listed by the Federal Coordinator of Transportation and 205 other interested parties. Objections were heard and numerous changes made. Finally on November 6, 1934, the commission promulgated its first regulations for the transportation of explosives and other dangerous articles in interstate commerce by motor truck or other vehicle. 49 C.F.R. (1st ed.) Pt. 85; see *Regulations for Transportation of Explosives*, 211 I.C.C. 351, 354 (1935).

The predecessor to Section 197.1(b) (Section 85.34(b)) read at that time as follows:

> In transporting by motor truck or other vehicle any explosive, or any bulk shipment of inflammable liquid or corrosive liquid, all congested thoroughfares, places where crowds are assembled, street-car tracks, tunnels, viaducts, and dangerous crossings should be avoided as much as possible.

These regulations were modified on numerous occasions, but it was not until 1940 that a change was made which affected the text of the predecessors of Section 197.1(b). The 1940 change was a complete revision of all the regulations for motor transport of explosives and inflammables. Preparation and hearings for the change occupied over three years. A first draft was submitted to all motor carriers and other interested parties whose criticism was solicited. Some forty to fifty replies were received, many from groups or associations. The replies were annotated and used as the basis for revisions leading to a second draft. The second draft was also mailed to all motor carriers and interested parties. Sixty to seventy comments were received, and numerous conferences were held with the representatives of the carriers. As a result of the conferences and comments on the second draft, a third draft was formulated. This draft became the basis for extensive hearings held in Los Angeles, Tulsa, and Washington, D. C. 5

F.R. 1476-1477 (1940); *Motor Carrier Safety Regulations-Explosives, etc.*, 22 M.C.C. 477 (1940).

The predecessor to Section 197.1(b) was carefully considered in the course of the investigations. In the first draft it was Section 20 and read as follows:

> Motor vehicles transporting any explosives, or any bulk shipment of inflammable or corrosive liquids shall avoid, so far as possible, congested thoroughfares, places where crowds are assembled, street-car tracks, tunnels, viaducts, and dangerous crossings.

The circulation of the first draft to interested parties resulted in some criticism.[3] Vickers Petroleum Company, in a letter dated July 26, 1937, stated that it would be "practically impossible to comply with this ruling." Shell Petroleum Corporation of St. Louis, in a letter dated August 16, 1937, stated the regulation was unreasonable since it would be entirely possible to avoid the places mentioned, but only by driving many times the distance of the shortest route. Aetna Casualty & Surety Company, in a letter of July 28, 1937, suggested that the best feasible routes be pointed out to carriers as well as the best times of the day to drive. The remaining comments were irrelevant to the present problem, e.g., suggestions that the entire matter be left to local regulation or that the

[3] The information as to the extent to which the industry participated in the drafting has been obtained from the files of the Interstate Commerce Commission.

carrying of inflammables is not hazardous and should be omitted from the regulations.

The section was revised in the second draft to read as follows (Section 13C):

> Drivers of motor vehicles transporting inflammable liquids shall avoid, so far as practicable, congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. So far as possible, this shall be accomplished by prearrangement of routes.

Section 17B of the second draft was parallel except that the word "explosives" was substituted for "inflammable liquids." No comments as to either section as revised were received from interested parties.

The third draft contained the identical provisions renumbered as Section C-10 and Section B-18, respectively. At the hearings, the American Transit Association suggested that the word "possible" in Section C-10 be changed to "practicable." Two others suggested a change to recognize the good judgment of drivers. No relevant suggestions were made concerning Section B-18.[5]

---

[4] Section 28 also used the word "possible" stating: "Wherever possible dangerous and less dangerous explosives shall be transported only during daylight hours." Of six comments received, one stated the rule was meaningless and the remainder objected to the substance of the regulation.

[5] Section 28, mentioned in note 4, *supra*, became Section B-24 and read: "Wherever possible dangerous and less dangerous explosives shall be transported only during the daylight and early morning hours." Numerous objections to the word "pos-

As a result of the hearings, Sections C-10 and B-18 were modified as suggested by the American Transit Association. The word "possible" in the second sentence became "practicable." Thus the regulation applicable to inflammables read (49 C.F.R. (1940 supp.) 197-7.3082):

> Drivers of motor vehicles transporting inflammable liquids shall avoid, so far as practicable, driving into or through congested thoroughfares, places where crowds are assembled, streetcar tracks, tunnels, viaducts and dangerous crossings. So far as practicable, this shall be accomplished by prearrangement of routes.

The regulations have been amended on numerous occasions since 1940, but only one minor change was made in the section involved here. It was amended to its present form on April 7, 1942 (7 F.R. 2869, 2870), and now reads:

> Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, streetcar tracks, tunnels, viaducts, and dangerous crossings.

---

sible" were heard at the hearings, seven suggesting that it be changed to "practicable," and two suggesting a change to "practical." The American Transit Association explained that "practicable" was a better word for the reason that overnight runs are frequent in practice and that night transportation might be safer than day.

This history of Section 197.1(b) shows that the regulation was carefully drafted and has been in effect in one form or another since 1934. It shows that the carriers and their representatives were not only permitted, but were encouraged to participate extensively in drafting the regulation.[6] As a result of their representations, the word "possible" as it appeared in the original regulation became "practicable." With that change they were content, evidently feeling that the regulation was then reasonable and workable.

II

Section 197.1(b) Is Sufficiently Certain That Those Affected May Know What Acts Are Criminal

Section 197.1(b) requires drivers of motor vehicles transporting inflammables and other dangerous substances to avoid "so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." It must be read with 18 U.S.C. 835 which directs that the commission make regulations covering the transport of dangerous substances "binding upon all common carriers" and makes it a crime knowingly

[6] Under 18 U.S.C. 835, the commission of its own motion or on application of interested parties can modify the regulations. The regulations are constantly being modified, often as a result of the applications of the carriers themselves. See e.g. 6 F.R. 4373 (1941); *Regulations for Transportation of Explosives*, 211 I.C.C. 351 (1935).

to violate such a regulation. It must also be read with 49 C.F.R. (1949 ed.) 197.02, which provides:

> Every motor carrier and his or its officers, agents, employees, and representatives concerned with the transportation of explosives and other dangerous articles by motor vehicle, shall become conversant and comply with the regulations prescribed in this part [197]; and, to this end, each motor carrier shall instruct such persons.

The duty of the carrier itself to obey the regulation is thus made clear.

In positive language, the regulation directs drivers transporting inflammables and other dangerous substances to avoid the places mentioned. But the word "avoid" is qualified. It is qualified by the words "so far as practicable, and, where feasible, by prearrangement of routes." The principal contention of the petitioner is that the words "practicable" and "feasible" used in the regulation are uncertain. Petitioner professes to find it impossible to determine when it must avoid a congested thoroughfare or a tunnel.

In 49 C.F.R. 190.1(n) it is provided that any term not defined elsewhere, as used in the chapter "is used in its commonly accepted meaning." So we turn first to Webster (New Int. Dict., 2d ed.) for the meanings of the terms.

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[7] As codified the rule reads "as used in Parts 191-196," although, apparently "191-197" was intended. See 4 F.R. 2295 (1939). In any event, the principle stated by the rule should be applicable here.

Webster defines "practicable" as follows:

1. That may be practiced or performed; capable of being put into practice, done, or accomplished; feasible; as, a *practicable* method; a *practicable* aim; a *practicable* good.

2. Capable of being used; usable; as, a *practicable* weapon; specif., *Theat.*, that may be used as real, as a door.

3. Readily practiced on; gullible; pliant. *Slang.*

Syn.—PRACTICABLE, PRACTICAL are sometimes confused. That is PRACTICABLE (opposed to *impracticable*) which is capable of being accomplished; that is PRACTICAL (opposed to *theoretical* and the like) which can be actually turned to account.

Webster defines "feasible" thus:

1. Capable of being done, executed, or effected; possible of realization; as, your plan seems *feasible;* hence, successful in operation.

2. Capable of being managed, utilized, or dealt with successfully; suitable; as, to find Nice *feasible* for an invalid.

3. Likely; probable; reasonable.

Examination of these definitions makes it clear that they have definite and unambiguous meanings. "Practicable" means capable of being put into practice or used. "Feasible" has almost the same meaning except that it has the additional

concept of "successfully" or "reasonably." When then must the carrier avoid congested thoroughfares and tunnels by prearrangement of routes? Only, "so far as practicable, and, where feasible." In other words he must avoid congested thoroughfares and tunnels by prearrangement of routes when such a course of action is capable of being put into practice successfully and reasonably, or when such routes are capable of being used successfully and reasonably. Clearly if a carrier resorts to the dictionary he will have no trouble in finding out what the regulation requires.

"Practicable" alone in the context of Section 197.1(b) might possibly be construed to mean mechanically practicable. The word has often been used in the safety regulations to mean mechanical practicability. See, e.g., Sections 74.588 (a); 74.594(h); cf. 197.1(f). But used with "feasible" the additional requirement of successful operation comes into being.

The word "practicable" is not without a certain legal meaning in this and other contexts. It is significant that the word has been part of the statutory language in this field for more than 80 years.[8] It was formerly provided by the Act of February 28, 1871 (16 Stat. 441, as amended by 19 Stat. 252; 46 U.S.C. (1934 ed.) 465) that "Refined petroleum * * * may be carried on board such

[8] 18 U.S.C. 835 provides that the regulations must "be in accord with the best-known practicable means for securing safety in transit."

[passenger] steamers upon routes where there is no other practicable mode of transporting it, under such regulations as shall be prescribed by the board of supervising inspectors." In *United States* v. *Thornburg*, 6 Fed. 41, 42 (S.D. Ohio), affirmed *sub nom. United States* v. *Wise*, 7 Fed. 190 (C.C. S.D. Ohio), it was held that the trial court could charge: "If there be an all-rail route over which the oil may be carried with any profit, it is a practicable mode of transportation." The circuit court agreed that the word "practicable" means commercially rather than mechanically practicable. See also *The Benton*, 51 Fed. 302 (E.D. Mo.). We suggest that had the word "feasible" also been used in the above statute there never would have been any doubt that the word was used in the commercial sense to denote commercially successful operation.

This Court examined the meaning of the word "practicable" in *Sprole* v. *Binford*, 286 U. S. 374, 393. It stated:

> * * * "Shortest practicable route" is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest *possible* route, with-

out taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it.

The Third Circuit found no difficulty in interpreting a requirement that suitable provision be made outside railroad stations "when practicable" for the safe storage of explosives and that "every effort possible" be made to reduce the time of storage. This was a civil case where the plaintiff based his theory of negligence on alleged violations of regulations issued under the Transportation of Explosives Act. The court held that the regulation in context did not apply to explosives in carload lots. *Fidelity & Deposit Co.* v. *Lehigh Valley R. Co.*, 275 Fed. 922, 926.

We feel also that the history of the regulation is consistent with the meaning we have suggested for the words. Initially the places mentioned in the regulation were to be avoided "as much as possible." The first draft of the 1940 revision changed the qualification to "so far as possible." This was criticized as unreasonable, one critic pointing out that it would be "possible" to avoid the places mentioned but only by driving many times the distance of the shortest route. The word "practicable" was then substituted with no further objection. Thus, as in the *Sproles* case, *supra*, "practicable" was

used instead of "possible" to make the regulation workable.

Consider the problem of the motor carrier who desires to comply with Section 197.1(b). He is required to study available routes before he uses them to transport explosives and inflammables. If there is more than one route, he must determine whether one avoids the places mentioned to a greater extent than the others, and if so whether the safest route is also commercially feasible. At first sight, this may appear to require difficult value judgments. But in particular situations, the problem often becomes simplified. For example, there are many more or less direct routes between Detroit and points west which avoid Chicago. They may be congested, but are certainly less so than the routes through Chicago. The only judgment required as to whether such routes are commercially practicable is not too difficult a decision to make.[9]

If the only two routes between Jersey City and New York City were the congested Lincoln Tunnel and the congested Holland Tunnel, the judgment required by the regulation would not be difficult. He could use either route with impunity since he could not then avoid a congested thoroughfare, a tunnel or a viaduct. But assume that there is also in operation a special ferry which carries

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[9] Some companies find it practicable to avoid all towns of considerable size. *Regulations for Transportation of Explosives*, 211 I.C.C. 351, 352 (1935).

only trucks loaded with inflammables. Then he would be required to make a judgment as to the practicability of using the ferry. It is certainly not difficult for a carrier, with schedules, rates and routes of the ferry available, to determine whether use of a ferry is commercially practicable. And if a carrier can show that he honestly believed such route to be impracticable, then, as we discuss *infra*, he will be protected by reason of the fact that he can be punished only if he "knowingly violates" the regulation.

Petitioner clouds the issues at this stage of the case by suggesting (Pet. 7, Br. 11) that this Court take judicial notice that it is physically impossible for a truck to enter Brooklyn without "driving into or through 'congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts'." The indictment (R. 1-6) alleges in the counts at issue that petitioner "unlawfully and knowingly" did cause its driver to operate through a congested thoroughfare, that "there were other available and more practicable routes", and that the petitioner well knew that the "aforesaid" activities were in violation of Section 197.1(b). Under the familiar rule, facts as alleged in the indictment are admitted to be true for the purposes of this proceeding. Whether in fact alternative routes were available to the petitioner, and whether it was practicable and feasible for petitioner to use one of such alternative routes, are

issues which can be determined only by trial. At the trial, for example, it would be relevant for the government to show that the Delaware, Lackawanna and Western Railroad Company operates a special ferry between New York City and Hoboken for the transportation of motor trucks, tractors and semi-trailers handling inflammables. See I.C.C. No. 3681, Ferry Tariff No. 15, issued May 25, 1939, effective May 27, 1939, and supplements.

The regulation actually requires little more than responsible operation. The average driver frequently makes evaluations analogous to those required of the motor carrier under Section 197.1(b), and must base them upon much less information. It is not difficult for one en route from New York to Detroit via Canada to determine whether the extra miles it takes to avoid the congestion of Buffalo is practicable. It is not difficult for one en route from New York to Boston to determine whether the parkway system with its toll stations is more practicable than the old Post Road. It is unrealistic to claim that under the language of Section 197.1(b) a motor carrier would not know the kind of judgment he was called upon to exercise.

III

The Regulation Is Sufficiently Certain under Principles Established by Prior Decisions of This Court

This is but one of a long line of cases which have presented this Court with the problem of certainty

in criminal legislation.[10] The early statement of this rule was that if a statute was too vague for a man to know whether he had violated its prohibition, he was not within its terms. *United States* v. *Brewer*, 139 U.S. 278, 288. A later expression was that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. It is, however, far from easy to give the *Connally* rule definite content or specific application. As Justice Frankfurter, dissenting in *Winters* v. *New York*, 333 U.S. 507, 524, pointed out, indefiniteness "is itself an indefinite concept. There is no such thing as 'indefiniteness' in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained."

The process of matching words and phrases in statutes to determine whether one is as definite as another is difficult and to some extent inconclusive. Accordingly, we believe that the solution of each

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[10] Interestingly enough we can find but three cases (all state cases) in the past twenty years where this Court has struck down a statute or regulation on the ground of uncertainty. *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 242-243 (crime for oil producer to commit "economic waste" or to produce in excess of "reasonable market demands"); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (crime to be "member of any gang" under specified conditions); *Winters* v. *New York*, 333 U.S. 507 (crime to handle publication "principally made up of" criminal news and stories).

case must be a judgment based largely upon the text of the particular law in the context of the subject matter with which it deals. However, viewed as a whole, the cases contain underlying principles which we think clearly support the validity of the regulation here involved.

A. *The possible existence of borderline cases does not make a law unconstitutionally indefinite.* Petitioner contends (Pet. 11, Br. 12-13) that the statement in the court below that "individuals may differ as to what is practicable and as to what is feasible and that marginal cases may arise in which a defendant's view as to the practicability and feasibility of an alternate route may differ from the view of the jury which tries him" (R. 23) brings Section 197.1(b) squarely within the doctrine of the *Connally* case. Few criminal provisions would be constitutional if they were to be condemned merely because in some borderline cases a person could not be certain as to what a court and jury would decide. Petitioner has failed to consider that in many cases since *Connally* this Court has made it clear that the possible existence of borderline cases does not make a law unconstitutionally indefinite. Thus, in *Robinson v. United States*, 324 U. S. 282, 286, a case involving a death sentence, the Court pointed out that "In most English words and phrases there lurk uncertainties." This Court held, however, that nullification of the clearly expressed purpose of Congress

was not justified "because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise." And in *Jordan* v. *De George*, 341 U.S. 223, 231, the Court declared that it has "several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness."

Justice Holmes, as spokesman for the Court, dealt with the problem upon several occasions. In *Nash* v. *United States*, 229 U.S. 373, 377, he made the oft-quoted statement that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." Later, he maintained that his view in the *Nash* case was consistent with his position in *International Harvester* v. *Kentucky*, 234 U.S. 216, 223, stating that "a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade." The *Nash* case he explained "goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a

line in advance without an artificial simplification that would be unjust."

Finally, in *United States* v. *Wurzbach*, 280 U.S. 396, 399, he stated in words quite suitable to the present facts:

> * * * we imagine that no one not in search of trouble would feel any. Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk.

A similar view was expressed in *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502 where it is stated: "If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite."

The more recent cases are replete with similar expressions. Thus, in *United States* v. *Ragen*, 314 U.S. 513, 523, this Court held that the "mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." And in *United States* v. *Petrillo*, 332 U.S. 1, 6, this Court said: "as respondent points out, there are many factors that might be considered in de-

termining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes."

The petitioner was required to make two determinations: was there a route which made it possible to avoid "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." If so, was the alternate route "practicable" and "feasible". We submit that this decision is considerably easier to make than: whether sound trucks are "loud and raucous" (*Kovacs* v. *Cooper*, 336 U.S. 77, 79); whether competitive activities are "fair and open" (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183); whether sheep are interfering with the "usual and customary" use of a range (*Omaechevarria* v. *Idaho*, 246 U.S. 343, 348); whether activities are "reasonably calculated" or "tend" to fix prices (*Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86); whether a fire is "near" the public domain (*United States* v. *Alford*, 274 U.S. 264); whether income tax deductions are for "a reasonable allowance for salaries or other compensation for personal services actually rendered" (*United States* v. *Ragen*, 314 U.S. 513); or, whether one is coercing an employer to employ persons in excess of the number "needed" (*United States* v. *Petrillo*, 332 U.S. 1). Yet men can constitutionally be required to make all of these decisions.

Certainly in applying Section 197.1(b) there is no more risk that a judge or jury may disagree with the defendant's judgment than a requirement that in case of fire hotel keepers "do all in their power" to save their guests. *Miller* v. *Strahl*, 239 U.S. 426, 434; and see *Whitney* v. *California*, 274 U.S. 357, 368-369; *Communications Ass'n* v. *Douds*, 339 U.S. 382, 412.

There are countless state criminal statutes which require that a line be drawn between criminal (or analogous) and innocent conduct, and which require defendant, judge and jury to make difficult judgments. E.g. *Aiton* v. *Board of Medical Examiners*, 13 Ariz. 354 (1911) (revocation of physician's license for "unprofessional conduct"); *Ex parte Daniels*, 183 Cal. 636 (1920) (driving faster than "reasonable and proper"); *Hunt* v. *State*, 195 Ind. 585 (1924) (hauling when road "by reason of wet weather is in condition to be cut up and injured"); *Bailey* v. *Commonwealth*, 235 Ky. 173 (1930) (failure to provide "suitable and proper" washrooms); *People* v. *Thompson*, 259 Mich. 109 (1932) (failure to render "reasonable assistance" after accident); *State* v. *Graham*, 176 Minn. 164 (1929) (driving "under the influence of intoxicating liquor"); *State* v. *Bailey*, 115 Ore. 428 (1925) (failure to support "without just or sufficient cause"); *Com. ex rel. Woodruff* v. *American Baseball Club of Phila.*, 299 Pa. 136 (1927) (performing "worldly employment or business" on Sunday).

A rather close analogy to the present regulation is found in the state criminal negligence statutes. See, generally, *People* v. *Angelo*, 246 N. Y. 451; Riesenfeld, *Negligent Homicide* (1936), 25 Cal. L. R. 1. Such statutes have been upheld repeatedly against contentions that they were unconstitutionally vague and indefinite. *State* v. *Magaha*, 182 Md. 122, 32 A. 2d 477; *State* v. *Bolsinger*, 221 Minn. 154. When this Court was confronted with an Oregon statute which made criminal the driving of a motor vehicle "at a rate of speed that will endanger the property of another, or the life or limb of any person," it sustained a conviction per curiam on the authority of *Nash* v. *United States*, *supra*. *Miller* v. *Oregon*, 273 U.S. 657. During the same term of court, Chief Justice Taft, speaking for the Court in *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 465, characterized the result in *Miller* v. *Oregon* with the statement that "Such standard for the driver of an automobile on a highway is one to which it is neither harsh nor abitrary to hold those criminally who operate such a possibly dangerous instrument of locomotion, and who are or ought to be aware of what degree of care is necessary to avoid injury to others under the conditions that prevail on a highway." The regulation here involved is far short of a general criminal negligence statute; rather, it in effect applies the concept of criminal negligence to the single factor of route selection in the transportation of

explosives and inflammables. *A fortiori,* it is sufficiently definite.

We conclude from our examination of the cases that a statute will not be found constitutionally indefinite because of the possibility of doubt in peripheral cases. If there is a hard core of circumstances to which the regulation will apply and if this constitutes the mass of situations with which the regulation deals, constitutional requirements are fulfilled. Even apart from the additional protection afforded by the requirement that the regulation be knowingly violated for the conduct to be criminal, Section 197.1(b) is such a regulation.

Regulation Section 197.1(b) is not even designed to reach borderline cases. It requires the avoidance "so far as practicable, and, where feasible, by prearrangement" of congested routes and the other places mentioned. If all available routes are congested there would be no problem of choice. Necessity of a judgment as to practicability comes only when one is congested and another is not. Certainly there is a hard core of circumstances in which the judgment required by the regulation is clear and definite. Tunnels and viaducts are to be avoided so far as practicable. As between the Lincoln Tunnel and the Holland Tunnel no choice is required. But both are to be avoided if practicable, which might be the case if there is an available ferry.

If peripheral cases conceivably may arise, if

this particular case should turn out to be a peripheral case, petitioners are not without remedies. If after refinement of pleadings, presentation of evidence, the tendering of precise instructions for the jury, the verdict, the denial of a new trial, a peripheral case is decided against a defendant, he still is not deprived of constitutional rights. He may argue that because of the uncertainty under the particular facts the regulation was unconstitutional as applied. See *Herndon* v. *Lowry*, 301 U.S. 242; *Smith* v. *Cahoon*, 283 U.S. 553. He may contend that his acts did not fall within the intended prohibition of the regulation. *Kraus & Bros.* v. *United States*, 327 U.S. 614; cf. ground of concurrence of Justices Holmes and Brandeis in *Connally* v. *General Const. Co.*, 269 U.S. 385, 396; concurring opinion of Justice Pitney (joined by Justice Brandeis) in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 93). The possibility of a difficult, or even an erroneous, application to a particular set of facts does not render the regulation invalid as generally applied.

B. *The seriousness of the problem with which the regulation deals and its limited applicability to a specialized group are additional reasons for imposing the burden of the regulation upon carriers.* "Motor carriers of dangerous explosives owe a special duty to the public, and must be taken to have assumed a higher degree of responsibility than carriers of general commodities, to the end

that ample protection will be afforded the public." *Hughes Transportation, Inc., Extension-Southeastern States,* 46 M.C.C. 603, 620 (1946); cf. *Folker Extension of Operations-Coal,* 34 M.C.C. 449, 452 (1942). No one can deny the risk. We suggest that in the light of the seriousness of the problem, the fact that Section 197.1(b) may require some defendants to make difficult judgments will not render the regulation unconstitutional.

That the standard of required certainty may vary with the seriousness of the evil to be prevented was made clear by the Court, speaking through Justice Holmes, in *United States* v. *Alford,* 274 U.S. 264, 267, where it was held that a statute was not unconstitutionally vague which made it a crime to build a fire "in or near" forests or other inflammable material in the public domain. The Court declared: "The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law." It is significant that petitioner has pointed to no case involving a dangerous business where this Court has held a statute or regulation to be unconstitutionally vague.

By engaging in the business of transporting inflammables petitioner asserted an honest purpose to carry on his operations in such a manner as to safeguard the public so far as practicable. The statute requires no more. Cf. *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 501-502. Cer-

tainly he "who assumes duties may be required to perform them" and when petitioner entered this dangerous enterprise it "undertook its obligations." Cf. *Miller* v. *Strahl*, 239 U.S. 426, 432. We are certain that those familiar with the business of transporting inflammables by truck "will have little difficulty in determining what is prohibited" by Section 197.1(b). Cf. *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348. Persons in the class of petitioner could have discovered their duty, and that is the most that due process requires.

The regulation questioned here is applicable to a relatively limited group—motor carriers of explosives and inflammables. It requires that members of this group look for routes which are uncongested and avoid tunnels and viaducts. When such alternate routes are available they must determine whether they are practicable before they can use routes which are congested or pass through the other places mentioned. Motor carriers are experts in searching out routes and in determining their practicability. This regulation should be sufficient to guide them in exercising the judgment required.

The requirement of the *Connally* case is not that a statute be clear to ordinary men. It must be sufficiently explicit to inform those "who are subject to it," what conduct on their part will render them liable to its penalties. 269 U.S. at 391; *Kay* v. *United States*, 303 U.S. 1, 9. The Court suggested

this same principle in *Kovacs* v. *Cooper*, 336 U.S. 77, 79, when it pointed out that while "loud and raucous" are abstract words, they have acquired a content that conveys to "any interested person" a sufficiently accurate concept of what is forbidden.

C. *The impossibility of drafting a more precise provision is to be taken into account in determining whether Section [illegible].1(b) is sufficiently definite.* This Court point out in *United States* v. *Petrillo*, 332 U.S. 1, 7-8, that "the Constitution does not require impossible standards," and in *Jordan* v. *De George*, 341 U.S. 223, 231 that "Impossible standards of specificity are not required." Certainly the Commission is not required to define all the specific instances to be brought within a regulation. Cf. *Balt. & Ohio R.R.* v. *Int. Com. Comm.*, 221 U.S. 612, 620. As Justice Frankfurter suggested in his dissent in *Winters* v. *New York*, 333 U.S. 507, 525, "the demands upon legislation, and its responses, are variable and multiform. That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject-matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied."

Explosive and inflammable commodities are carried by many routes all over the country. The Commission cannot successfully regulate the transportation and shipment of explosives if general terms cannot be used. It would be utterly impossible to cover the entire United States in a regulation specifying all places, routes and localities

through or by which explosives, inflammables and similar articles may or may not be transported. The only practical way for the Commission to carry out its statutory duty is to require the carriers to utilize their knowledge and intelligence. In its regulations governing the transport of explosives and inflammables, the Commission has frequently made use of generic terms. Thus the regulations frequently use such terms as "careful men", "all possible precautions", "safe place", "more force than is necessary", "probable danger", "safe distance", "when necessary", "when possible", and "except in case of emergency." E.g. 49 C.F.R. (1949 ed.) 74.586(c)(e), 74.589(c)(e), 74.594(e)(g), 77.835(j). As a matter of fact they frequently make use of the word "practicable." E.g. 49 C.F.R. (1949 ed.) 74.577(a), 74.587(a), 74.588(a)(f), 74.594(h), 74.598(a), 77.835(j), 77.855(a)(c), 77.856(d), 77.857(a). If Section 197.1(b) is held to be uncertain, so are these and many other regulations which have worked successfully since 1908. The use of general terms is inevitable if power to safeguard the public and employees in this field is not to be denied. In *Balt. & Ohio R. R. v. Int. Com. Comm.*, 221 U.S. 612, 620, a statute provided that specified classes of employees were not to work more than nine of any twenty-four hours "except in case of emergency." In answer to the uncertainty argument, the Court said:

> * * * But this argument in substance denies to the legislature the power to use a generic description, and if pressed to its logical con-

clusion would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged.

In this connection it is significant that, both before and after the accident referred to in Count 1 of the indictment in this case, the legislatures of New York and New Jersey, in dealing with the problem of routing dangerous articles, were apparently unable to formulate rules more precise than the regulation here involved. Thus, a 1941 New Jersey statute provides that, "The operator of a vehicle transporting explosives shall avoid, *wherever possible*, those streets that are congested, or where there is a large number of persons, or where there exists a subway or elevated route" (emphasis supplied).[11] In 1951, the New York legislature provided that, "It shall be unlawful to transport by motor vehicle over the highways within this state any dangerous article in such manner or condition as will unreasonably endanger the person or property of others."[12] Also, when New York and New Jersey in 1950 enacted identi-

[11] 21 N. J. S. A. 1A-96.

[12] N. Y. Vehicle and Traffic Law, sec. 16-c.

"Flammable liquids" means "any liquid which gives off flammable vapors * * * at or below a temperature of eighty degrees fahrenheit."

cal amendments to their statutes relating to the Hudson River bridges and tunnels operated by the Port of New York Authority, they provided that "No person shall transport in or upon a vehicular crossing, any * * * inflammable or combustible liquids, * * * at such time or place or in such manner or condition as to endanger unreasonably or as to be likely to endanger unreasonably persons or property."[13] Canada, by regulations the violation of which is made criminal, has provided that "a person in charge of a carriage or boat conveying explosives shall not delay for a longer time than may be reasonably necessary, nor stop unnecessarily at any place where such stopping would be attended with special public danger, and shall as far as possible select a route avoiding centres of habitation."[14] Thus, legislatures which have dealt with the problem, like the Interstate Commerce Commission, have been unable to treat the problem of routing explosives and other dangerous commodities otherwise than in terms of a standard of responsible judgment.

IV

The Regulation Is Given Certainty by Reason of the Fact That Only One Who "Knowingly Violates" It Can Be Punished

We submit that when Section 197.1(b) is read with 18 U.S.C. 835, which permits the punishment

[13] N. Y. Unconsolidated Laws, sec. 6508; 32 N. J. S. A. 1-154.8.

[14] Statutes of Canada, 1946, ch. 7, secs. 4, 24; 2 Statutory Orders and Regulations (Canada) Consol., 1949, p. 1270.

only of one who "knowingly violates" it, the constitutional objection must disappear. We contend that the words "knowingly violates" will permit punishment only for a wilful or reckless failure to consider the factor of safety in the selection of a route for the motor transport of explosives and inflammables. Conversely there can be no punishment for honest errors in judgment.

"Knowingly" is a word of differing meanings depending on the context in which it is used. We do not suggest that "knowingly violates" as used in 18 U. S. C. 835 should always be construed to require more than a mere intent to do an act prohibited by the regulations. For example, compliance with Section 197.1(e), which prohibits smoking while driving a truck containing explosives or inflammables, would involve no exercise in judgment; one would "knowingly violate" the regulation merely by deliberately engaging in the prohibited conduct. However, where compliance with a regulation requires the exercise of judgment or the weighing of facts, "knowingly" implicitly means a specific criminal intent or at least such a reckless disregard of consequences as will enable prosecutors and courts to distinguish honest mistakes in judgment from criminal conduct. If a motor carrier determines, within the limits of a judgment made in good faith, that there is no alternate route which avoids tunnels, bridges, congested thoroughfares and crowded places, or that such an

alternate route is not practicable and feasible, he does not knowingly violate the regulation. Under the statute and regulation as read together and applied in the indictment, only the failure to utilize a route (1) which avoids the specified places substantially more than does the route which actually was used, and (2) which is commercially feasible for the carrier to use, can subject the carrier to criminal liability.

In *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 71-72, this Court was required to interpret a statute which created personal liability for directors of national banking associations who "knowingly violate" a requirement that no loan to a person exceed one-tenth of the capital and surplus of the association. Revised Statutes, Sections 5200, 5239, now 12 U. S. C. 84, 93. The Court held that in addition to a showing that the regulation was violated, there must be proof "that defendant, while a director, participated in or assented to the excessive loan or loans not through mere negligence but knowingly and in effect intentionally, * * *; with this qualification, that if he deliberately refrained from investigating that which it was his duty to investigate, any resulting violation of the statute must be regarded as 'in effect intentional'." [15] We feel that the principle of the *Corsi-*

[15] See also *United States* v. *Starkey*, 52 F. Supp. 1, 2 (E.D. Ill.) where the crime was "knowingly" violating a statute prohibiting the transportation of diseased livestock. The court held that the statutory language required the exercise

cana case is applicable to a criminal regulation which, like the present one, requires investigation and judgment. Here, the word "knowingly" restricts criminal liability to those who fail to consider in good faith the factor of safety in routing dangerous commodities.

Once it is agreed that something approaching intentional violation or reckless disregard of consequences is required for the criminal sanctions to come into play, the infirmity of the constitutional objections to the regulation is manifest. This Court has consistently attached great significance to the existence of scienter where a question of certainty is raised. In no case where scienter has been an element of an offense has the court held a statute void for indefiniteness.[16] On the contrary, the Court has remarked that "whatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive of the effect upon them and their business, of a wrong conclusion * * * since they are not required to act at their peril but only to exercise their judgment in good faith, in order

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of "the reasonable care of a reasonably prudent dealer" in livestock, remarking that the "word 'knowingly' in a criminal statute commonly means that state of mind wherein the person charged is in possession of facts under which he is aware he can not lawfully do the act with which he is charged."

[16] Intent was no part of the clauses under attack in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. And the statutes held invalid in *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, and *Collins* v. *Kentucky*, 234 U.S. 634, had been construed by the state court to make combinations unlawful if they were either "for the purpose or with the effect of" fixing prices greater than the real value of the article.

to avoid coming into conflict with the statutes." *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413, this Court noted that "since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable." This same language had been used in *Screws* v. *United States*, 325 U. S. 91, 101-102, where the Court ruled that "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." Compare *Gorin* v. *United States*, 312 U. S. 19, 27-28; *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

This line of cases is entirely consistent with the *Connally* rule. The vice of an indefinite statute is that it places the accused on trial for an offense which the statute does not define and of which it gives no warning. But where the punishment is imposed only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot possibly be said to have suffered from lack of warning.

The regulation here involved has a meaning which, even apart from scienter, normal persons—

and certainly persons in the motor transport industry—would understand and have no difficulty of applying except in remotely possible borderline cases. No one can be punished for honest mistakes in close cases, since the statute limits criminal liability to those whose failure to consider the factor of safety in routing dangerous commodities reflects at least a reckless disregard of consequences.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be affirmed.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC., *Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF ON BEHALF OF THE PORT OF NEW YORK AUTHORITY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT'S POSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC.,
Appellant,
v.
UNITED STATES OF AMERICA,
Respondent.

BRIEF ON BEHALF OF THE PORT OF NEW YORK AUTHORITY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT'S POSITION

Statement of the Case

On May 13, 1949 a shipment of carbon bisulphide which was being transported in one of appellant's vehicles exploded in the Holland Tunnel. The explosion resulted in the injuries to sixty persons. In addition, over $600,000 in property damage was occasioned.

The First Count of the present Indictment arises out of the aforementioned holocaust. It charges appellant with violating a regulation of the Interstate Commerce Commission, 49 C. F. R. 238, 1949 Ed. Section 197.1(b), issued pursuant to statutory regulation contained in 18 U. S. C. 838, 62 Stat. 739. The regulation requires drivers of vehicles transporting explosives or other inflammable substances to avoid by prearrangement of routes driving into

congested thoroughfares or tunnels "so far as practicable and where feasible".

Counts Three and Five of the Indictment also charge appellant with violating the same regulation by transporting shipments of carbon bisulphide through the tunnel on two previous occasions. Counts Two, Four and Six are not here in issue.

The District Court granted appellant's motion to dismiss Counts One, Three and Five on the ground that the Interstate Commerce Commission regulation involved was invalid because its use of the terms "practicable" and "feasible" afforded no ascertainable standard of guilt, and also on the ground that said counts were ambiguous.

Upon appeal by the United States to the Court of Appeals for the Third Circuit, the dismissal of Counts One, Three and Five were reversed, the Court finding as a matter of law that (188 F. 2d 889, 891):

> "To one who knows of his duty under the regulation the imposition of a duty to arrange to use that route which avoids congested * * * tunnels * * * so far as practicable and where feasible, is not to put him to a choice so uncertain as to violate the constitution."

The Court held that prior decisions indicated that the term (p. 891):

> "'so far as practicable' means so far as commercially practicable from the standpoint of those engaged in the trucking business, and 'where feasible' undoubtedly means where physically feasible from the standpoint of the operation of the motor vehicle involved."

Accordingly the question here raised is whether the Interstate Commerce Commission regulation in question promulgated pursuant to specific Congressional authorization meets the constitutional requirement that a criminal statute or regulation afford an ascertainable standard of guilt.

The Port of New York Authority As *Amicus Curiae*

The Port of New York Authority files this *amicus curiae* brief pursuant to Rule 27 (d) of the Revised Rules of this Court. This rule provides that consent to file a brief of an *amicus curiae* need not be had when the brief is presented on behalf of a political subdivision of a State sponsored by its authorized law officer. The Port of New York Authority is a governmental agency of the States of New York and New Jersey having been created by Compact between them (Ch. 154, Laws of N. Y., 1921 and Ch. 151, Laws of N. J., 1921) consented to by Congress (Pub. Res. 17, 67th Cong. 1st Session, 1921). That the Port of New York Authority is a political subdivision of two States does not make it any the less a political subdivision of one State. See *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (1944) cert. den. 323 U. S. 792 (1945).

The Court below recognized the Port of New York Authority's concern in the outcome of this case by granting its motion for leave to file an *amicus curiae* brief (Record, p. 21). The Commissioners of The Port of New York Authority have by resolution dated November 9, 1951 authorized the filing by the Port Authority's General Counsel, its authorized law officer, of a brief in support of respondent's position before this Court.

The Port Authority is vitally interested in this proceeding. The explosion which forms the basis of Count One of the Indictment occurred in the Holland Tunnel, one of the Port Authority's under-water vehicular crossings. It is only by the sheerest good fortune that many lives were not lost and only sixty persons were injured. A repetition of the explosion might cause wholesale loss of life, injury to many more persons not to mention much greater property damage. In addition to the personal injuries occasioned in the May 13th explosion the tunnel was completely closed for five hours and one of its two tubes re-

mained closed for fifty-six hours and then required nightly closing for 103 days until the necessary repairs could be made. This not only inconvenienced numerous Port Authority patrons but diverted a large segment of interstate commerce into the Port Authority's Lincoln Tunnel, two miles further north, thereby increasing traffic congestion in midtown Manhattan.

Accordingly, the Port Authority as owner and operator of tunnels connecting the States of New York and New Jersey, is vitally concerned that no lives be lost or persons again be injured in its facilities. The Port Authority is interested in making certain that its interstate vehicular crossings receive the fullest possible protection from the hazards resulting from the transportation of dangerous cargoes. That such concern is not misplaced, and is, in fact, essential to the continued operation of Port Authority facilities, is most dramatically evidenced by the facts of the present case.

Port Authority tunnels carry a continuous flow of vehicles throughout the day and night. The density of the traffic and the confined nature of the tunnel roadways make it evident that in case of explosion, lives will be destroyed and severe bodily injury inflicted, and, of course, damage and destruction to the facilities and travelling vehicles will result. For that reason the Port Authority's own rules and regulations forbid truck-loads of inflammables and explosives from entering its tunnels. The necessity of such substances crossing the Hudson River is recognized, however, and their transportation over Port Authority bridges is permitted, with certain precautionary measures in the case of explosives. And, for the downtown New York area which the Port Authority serves only by tunnels, the Delaware, Lackawanna & Western Railroad operates a special ferry service for inflammables and explosives from Hoboken, N. J. to New York City under a tariff on file with the Interstate Commerce Commission.

It is apparent that if the regulation in question is not observed and respected in the future catastrophes similar

to that of May 13, 1949 will ensue. The Port Authority fears lest the deterrent effect of the I. C. C. regulation be removed from the arsenal of those whose responsibility it is to see that interstate commerce moves securely and safely, and with a minimum of threat to life and limb of the innocent by-standing public.

In the event of hostilities, destruction of the Port Authority's tunnels would be a prime military objective for the nation's enemies, well worth the loss of an entire fleet of aircraft to the enemy. We should not, by rejecting the present regulation, in effect invite our own citizens to serve the enemy by exposing these tunnels to daily destruction by explosives and inflammables.

The Port Authority therefore appears in this appeal by the motor carrier which caused the accident to demonstrate that the Interstate Commerce Commission regulation in question adequately meets the constitutional requirement of certainty so as to subject those responsible for the catastrophe to the penalties prescribed by law and deter a recurrence of such calamities. The Port Authority contends that the regulation considered in the light of the objective to be achieved and the subject matter being regulated, affords a standard of guilt sufficiently certain to meet the requirements of the Fifth and Sixth Amendments.

Summary of Argument

(1) In *Sproles* v. *Binford*, 286 U. S. 374 (1932) this Court considered the identical challenge here made to the identical test of "practicability" of the selection of highway routes in almost the identical context here involved and ruled that use of such a test affords adequate certainty and an ascertainable standard of guilt within the requirements of the Constitution. This decision is a controlling precedent for the instant case.

(2) "Practicability" as a test of permitted selection of routes in the regulation promulgated by the Interstate Com-

merce Commission is not too vague and indefinite to form the basis for a criminal statute, since it has a well accepted meaning by virtue of uniform federal court decisions.

(3) Even if individuals might differ in borderline cases as to whether specific conduct was or was not "practicable" within the meaning of the regulation, it is well settled that the possibility of such differences does not make the regulation invalid for vagueness and indefiniteness.

(4) In any event, the regulation is constitutional when applied to the extreme facts of the present situation. The borderline offender may be heard to argue that he was not informed in advance as to the nature of the offense. But where the act charged is a flagrant and extreme violation of the prohibition, adopting any possible meaning of the prohibiting language that is at all reasonable, then there is no constitutional vagueness or indefiniteness as applied to the specific case because there cannot possibly be a failure of adequate warning. Appellant must have known the extreme danger which is occasioned by carrying a shipment of carbon bisulphide into the congested Holland Tunnel at rush hour. Appellant failed to avoid the Tunnel by prearranging its route as required by the regulation and appellant must have known that in any sense of the word it was practicable and feasible to avoid the Tunnel and to use the other alternatives available like the special explosives ferry operated by the Delaware, Lackawanna & Western Railroad or the George Washington Bridge.

(5) Furthermore, the regulation is entitled to the well established presumption of constitutionality—for to do otherwise would unnecessarily thwart a clear and important Congressional purpose. The regulation can and should be interpreted so as to render it constitutional.

I

This Court has upheld the validity of the language here challenged in a context virtually identical to that in question.

In view of *Sproles* v. *Binford*, 286 U. S. 374 (1932) it is not an open question whether the test used in the instant regulation of the Interstate Commerce Commission meets the requirements which the Constitution imposes on a criminal statute. Speaking of this decision, the Court of Appeals for the Third Circuit stated in this case below (188 F. 2d 889, 891):

> "The conclusion which we have reached (that the regulation is constitutional) finds full support in *Sproles* v. *Binford*, 1932, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167, in which case the Supreme Court upheld a Texas statute, also dealing with safety regulations for motor vehicle transportation, which set up a standard of practicability somewhat analogous to that involved in the present regulation."

The question in the *Sproles* case was as to the constitutionality of certain Texas penal provisions prohibiting the operation on any highway of any vehicle exceeding stated limitations of size and weight except (p. 383):

> "when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination, * * *"

Objection was made on the ground that this provision, by use of the terms "nearest practicable common carrier receiving or loading point" and "shortest practicable route to destination" (p. 393):

> "is so uncertain that it affords no standard of conduct that it is possible to know."

The reasons why this Court, speaking unanimously could not agree with that view apply equally well to the arguments advanced against the regulation in the present case. The Court said (p. 393):

> "'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. * * * The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it."

There appears to be no distinction which would make the holding in the *Sproles* decision inapplicable to the instant case. Like the present regulation the statute at issue in the *Sproles* case, involved (1) safety regulations covering motor vehicle transportation adopted to minimize hazards and dangers to the public from such transportation; (2) establishment of a standard of "practicability" in selecting highway routes; (3) was challenged on the ground that the regulation formulated in terms of a standard of "practicability" was too vague to form the basis of a criminal proceeding; and (4) the alleged indefiniteness was not in the regulation's prohibition, which was quite definite, but in the regulation's exception framed in terms of practicability.

Appellant's attempted distinction says that "the expression 'shortest practicable route to destination' requires no more than the exercise of ordinary judgment and practical experience" (appellant's brief, p. 18). And, we submit, the regulation at issue identically requires no more than the exercise of ordinary judgment and practical experience in prearranging routes to minimize the danger

to the public from transporting hazardous loads through congested areas. Selecting the Holland Tunnel was the surest way of maximizing the danger and obviously violated a clear prohibition.

II

The words "practicable" and "feasible" in the instant regulation have a well accepted meaning defined in Court decisions.

Appellant's contention that the language of the Interstate Commerce Commission regulation in question is ambiguous is not legally tenable. Language in criminal statutes identical to that of the present regulation applying to the selection of routes of transporting dangerous cargo has been interpreted in several court decisions. Thus, in addition to its clear meaning as a matter of common usage and understanding, the language of the regulation in question has a well accepted meaning by virtue of such judicial interpretation—a meaning which affords an ascertainable standard of guilt. As construed by the Courts, "practicable" in a context such as that of the regulation means "commercially practicable".

The statute considered by the Court in *The Benton*, 51 F. 302 (1892) prohibited the transportation of numerous inflammable articles on passenger vessels, including refined petroleum. However, under certain conditions the statute permitted the transportation of refined petroleum upon such steamers (p. 302):

> "where there is no other practicable mode of transporting it"

Interpreting the word "practicable" as used in the statute, the Court said (p. 303):

> "The word 'practicable,' as used in the statute, (section 4472,) has been held to mean 'commercially

practicable,' as distinguished from 'physically or mechanically practicable,' and that seems to be a very reasonable, if not a necessary, interpretation of the statute. *U. S.* v. *Wise* and *U. S.* v. *Thornburg*, 6 Fed. Rep. 41, and 7 Fed. Rep. 190."

In discussing the facts of this case the Court stated (p. 303):

"It appears from the agreed statement that there was a practicable mode of transporting the coal oil in question from St. Louis to Osage City and Bonnett's Mills otherwise than by steamer. It might have been carried by rail between those points for about the same price charged by the steamer. On the other hand, it appears that there was no practicable mode of transporting it from Osage City and Bonnett's Mills to the points further up the Osage river to which it was destined than by steamer. Does this latter fact render the transportation of the commodity from St. Louis to Osage City and Bonnett's Mills by a passenger steamer lawful? The court decides this question in the negative. It was not commercially impracticable, as the agreed statement shows, to ship the oil to its ultimate destination partly by rail and partly by water. It had to be unloaded, in any event, at Osage City and Bonnett's Mills, and to be thence forwarded to its destination by another steamer, as the steamers that ply on the Missouri river cannot ordinarily ascend the Osage; and the total cost of transportation over the whole route, if carried from St. Louis to the latter place by rail, would not, as it seems, have been materially greater than if carried for the whole distance by water. If it be conceded that inflammable commodities, like coal oil, can be lawfully carried on passenger steamers merely because the ultimate point of destination is a short distance off the line of a railroad, then it would frequently happen that such commodities would be carried for long distances by water, thereby enhancing the dangers of travel and defeating the beneficient purposes of the act."

On the basis of those facts the Court concluded (p. 304):

> "The court is accordingly of the opinion that when, as in the present case, it is commercially practicable to transport such a commodity as coal oil by rail for a considerable portion of the distance to be covered, and thence by water to its ultimate destination, that method of transportation is the only one that can be lawfully employed, even though it is possible to transport it for the entire distance by water, and not possible to transport it the entire distance by rail. Entertaining these views, judgment will be entered for the government on the second count, and also on the first count, of the information."

The word "practicable" as used in the statute interpreted by the Court in the *Benton* case had also been construed in *United States* v. *Wise*, 7 F. 190 (1881), as follows (p. 192):

> "* * * The question turns upon the construction of the statute—the meaning of the word 'practicable,' as used in section 4472, Rev. St. In one sense it was practicable to send the oil by rail in each case,—that is, in a mechanical sense; but it is my opinion that the word must be accepted in a commercial sense. The statute in question is a regulation of commerce, and whether a mode of transportation between any two points is practicable, must be decided with reference to the commerce between those points. If the rates charged for transportation by rail would amount to a prohibition of the traffic, it would not be a practicable mode of transportation within the meaning of this statute. * * * It must be held in these cases that passenger vessels are prohibited from carrying petroleum when it is practicable, in a business sense, to employ another mode of transportation; but if the effect of the prohibition would be to destroy such traffic it may be carried upon passenger vessels, subject to the cautionary provisions of the statute."

The federal statute involved in the *Benton* and *Wise* cases is closely analogous to the regulation promulgated by

the Interstate Commerce Commission. Each is designed to provide for the safe transportation of a dangerous cargo and each is phrased in terms of practicability. The courts in those cases relied upon apparent legislative intent in construing "practicable" to mean "commercially practicable". These cases have a dual significance here. In the first place, they furnish a long-standing, judicially approved, clear and definite meaning to the term "practicable" here challenged as vague and indefinite. As such they invoke the rule of *People* v. *Grogan*, 260 N. Y. 138, 145, 183 N. E. 273 (1932) that (p. 145):

> "the offense of reckless driving is sufficiently definite, *because of the meaning heretofore given* to 'reckless,' to make this portion of the section constitutional." (Emphasis ours)

Not only do these cases supply a long standing and judicially sanctioned meaning to the term "practicable" but they also are significant because penal provisions couched in terms of practicability were there enforced. These cases were not civil actions at common law or proceedings in equity but like the present case were criminal prosecutions.

In attempting to distinguish these cases appellant concedes (appellant's brief, p. 18) that the regulation in question would be valid if it "had provided that inflammables could not be transported through a tunnel unless there was no other practicable way of the cargo reaching its destination". Yet any reasonable interpretation of the regulation must give it exactly that meaning. A direction to avoid tunnels so far as practicable and where feasible is nothing more nor less than a prohibition to avoid tunnels unless no other practicable way exists. If that degree of interpretation would be required to make the regulation constitutional, then, as will be shown in Point V, the normal rules of construction would require the interpretation to be made. Here, however, no ambiguity exists which requires any interpretation and the regulation has exactly the meaning which appellant concedes would establish its validity.

The Court knows full well that many cases contain apt formulations of the general principle that criminal statutes must be definite enough to afford an ascertainable standard of guilt—cases which have both upheld and condemned the constitutionality of the particular statute or regulation attacked. The Court does not receive too much assistance nor is there much precedent value in a group of quotations, such as appellant offers, announcing the general principle in cases involving statutory language and factual situations with no similarity to the language of the present regulation and the facts of the offense charged.

Especially is this true when there exists, as in the present case, decisions closely in point both as to the constitutionality and interpretation of language making the selection of highway routes dependent upon a test of practicability and feasibility. Accordingly, because of the relevance of the *Sproles*, *Benton* and *Wise* decisions, no point can be served in distinguishing at length the cases cited by appellant in its attempt to invoke precedent in its attack on the present regulation.

For example, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921) (appellant's brief, p. 6) involved the validity of a statute making it unlawful to charge an unjust or unreasonable rate or charge for necessaries; *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926) (appellant's brief, p. 6), concerned the validity of a statute requiring a contractor to pay employees "not less than the current rate of per diem wages in a locality where the work is performed"; *Winters* v. *New York*, 333 U. S. 507 (1948) (appellant's brief, p. 7), had to do with the validity of a statute making it an offense to distribute or publish publications "principally made up of criminal news, police reports or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime"; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927) (appellant's brief, p. 14) concerned the validity of a statute which prohibited combinations in restraint of trade with certain exceptions; *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946) (appellant's brief, p. 7) *upheld* the validity of a maximum price regu-

lation; and *United States* v. *Capitol Traction Co.*, 34 App. D. C. 592 (1910) (appellant's brief, p. 16), concerned the adequacy of street railway service. No matter how many such cases can be marshalled stating the rule and instancing both constitutional and unconstitutional statutes and regulations, they offer no precedent and shed little light on the question of the validity of a regulation requiring a selection of practicable routes for the transportation of dangerous commodities. The only cases on that point support the validity of the present regulation.

III

The possibility that individuals might differ as to whether specific conduct is practicable does not make the regulation invalid.

Appellant seems impressed by the observation that different individuals might reach different conclusions as to what constituted a practicable route under the regulation. That individuals might differ or that juries themselves on the same factual situation might reach different conclusions is not enough to warrant declaring a regulation invalid for failure to establish an ascertainable standard of guilt. This Court has on frequent occasions declared that marginal cases will exist as respects most criminal statutes, but that criminal statutes are not thereby rendered invalid.

In *Nash* v. *United States*, 229 U. S. 373 (1913), the Court considered a criminal indictment under the Sherman Anti-Trust Act. Objection to the criminal operation of the statute was raised by defendant on the ground that the crime defined by the statute contained in its definition an element of degree as to which estimates might differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. In replying to this objection, Mr. Justice Holmes stated (p. 377):

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury

subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' * * * 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.'"

The same point was more recently made in *United States* v. *Petrillo*, 332 U. S. 1 (1947), where the constitutionality of a federal statute declaring it unlawful to use force to coerce, compel or constrain a licensee of the Federal Communications Commission to employ or agree to employ, "any person or persons in excess of the number of employees needed by such licensee to perform actual services" was at issue. Punishment upon conviction was by imprisonment for not more than one year or by fine of not more than $5,000 or both.

In sustaining the validity of the section in question, Mr. Justice Black, writing for the Court, declared (p. 7):

"Clearer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be."

To this Court (p. 7):

> "The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. * * * it would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees."

As applicable to the present case as to the *Petrillo* decision is Mr. Justice Black's statement that (p. 7):

> "The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."

Justice Holmes wrote for this Court in *United States* v. *Wurzbach*, 280 U. S. 396 (1930), when the constitutionality of a federal statute making it unlawful for federal officers or employees to solicit money "for any political purpose whatever" from any other federal officer or employee was upheld. Objection was to the definiteness of the phrase "any political purpose". In rejecting this objection, Justice Holmes remarked (p. 399):

> "But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides.

> The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

Also in point is *United States* v. *Ragen*, 314 U. S. 513 (1942). This case involved the constitutionality of the Revenue Act of 1932 which provided that any person who wilfully attempted to evade any tax imposed by the Act is guilty of a felony. The Circuit Court of Appeals held a portion of the Act invalid because as applied it (118 F. 2d 128, 139):

> "would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void."

However, this Court unanimously held to the contrary, pointing out (p. 522):

> "Determination of allowable deductions by reference to a standard of 'reasonableness' is not unusual under federal income tax laws."

Furthermore, in language equally applicable to the present case, this Court stated (p. 523):

> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

This phase of the opinion was concluded with the following observations (p. 524):

> "A finding of unconstitutional uncertainty in this section of the act as applied here would be a negation of experience and common sense.
>
> "On no construction can the statutory provisions here involved become a trap for those who act in

good faith. A mind intent upon willful evasion is inconsistent with surprised innocence."

In *People* v. *Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931), ief Judge Cardozo for The New York Court of Appeals sidered the constitutionality of a penal law punishing ectors of monied corporations who participated in a udulent insolvency of such corporations. The statute vided that the insolvency of a monied corporation was med fraudulent unless its affairs appeared upon investi- ion "to have been administered fairly, legally and with same care and diligence that agents receiving a com- sation for their services are bound, by law, to observe." wrote (p. 470):

> "The act is not shorn of certainty of meaning by its reference to a standard of customary diligence. The power of the Legislature to make it a crime for banking officers to be so neglectful of their duties as to involve their banks in ruin is hardly to be doubted. The power existing, one is at a loss to imagine how the prohibited omissions could be more accurately stated, without a catalogue of particulars not susceptible of enumeration in advance of the event * * *"

IV

No possible doubt can exist as to application of the ulation's test to the instant case because here appellant lated the regulation's prohibition under circumstances which it clearly applied.

The authorities cited in the previous Point demonstrate t even if individuals differ in borderline cases as to ether specific conduct was or was not prohibited, the sibility of such difference does not make the statute ch prohibits the conduct invalid on the ground of vague- s and indefiniteness. This rule of law goes far beyond actual necessities of the present case which is not a

derline one but one of extreme disregard of the regu-
on's prohibition on any possible interpretation of the
uage which is reasonable. One doesn't require a
dard of tallness to be able to conclude that a seven foot
is tall. We submit that it must have been clear to
ellant because of the circumstances under which its
occurred that if the regulation in question was designed
o anything, it was designed to prohibit the doing of
tly that which appellant did. Accordingly, the regula-
cannot be said to be vague and indefinite as applied to
facts of this case.

It is clear beyond all doubt that what the regulation
ght to do was to minimize the danger of driving vehicles
aining explosives or inflammable substances by requir-
them to avoid tunnels and other especially vulnerable
congested places when alternative routes were physi-
available and commercially practicable. While in
ain borderline cases it might be possible to argue that
escape clause is indefinite and uncertain, such an
ument can hardly lie within this appellant's mouth.

The appellant asks several rhetorical questions (appel-
's brief, p. 12) to suggest a confusing multiplicity of
rnatives as to the route it should have selected to cross
Hudson River. Significantly enough, among the ques-
s posing alternative routes, there does not appear a
stion whether appellant should have taken the special
kawanna Ferry established with particular schedules
ricted to vehicles carrying explosives and inflammables
oss the Hudson River. Yet that alternative existed, as
er the Court knows judicially or, under the indictment,
d have been proved. And with the existence of such
ecial segregated explosives ferry route, obviously it was
cticable and feasible to avoid all other ferries and
lges, let alone tunnels, and no carrier of inflammables
xplosives could have conscientiously believed that any
r alternative was open to it in the area traversed by
appellant on May 13, 1949.

The fact is that appellant not only avoided the only open alternative to downtown New York which was practicable and feasible, but chose the alternative *most* calculated to produce devastation and catastrophe. Concededly it was not feasible or practicable to cross the Hudson River without using a bridge, tunnel or ferry. But so long as any bridge or ferry was available, let alone one specifically provided and restricted to dangerous cargoes, it was not only feasible and practicable to avoid such a tunnel as the Holland Tunnel, but a simple matter of ordinary humanity and common sense.

It takes no proof to know that an explosion in a congested under-river tunnel like the Holland Tunnel is likely to produce a holocaust. Under the circumstances which the Court knows judicially or which could be proved under the indictment, use of the Holland Tunnel particularly at the height of the morning rush hour, could never be considered an alternative open to a driver of a truckload of highly inflammable liquids and no such driver can possibly be heard to say that he didn't know that the Interstate Commerce Commission regulation intended to exclude such a cargo from such a tunnel.

The main if not sole reason why criminal statutes are required to be definite and certain is that elementary principles of justice require that one should know before he acts whether his contemplated conduct runs afoul of the penal law. Since appellant must have known under the extreme circumstances of the instant case that if the regulation was designed to prohibit anything it was the doing of exactly what appellant did, it had adequate warning in this case. Having such warning the accused cannot invoke the constitutional protection in this case.

Screws v. *United States*, 325 U. S. 91 (1945) is in point. In that case this Court upheld Section 20 of the Criminal Code against the same contention of vagueness, indefiniteness and uncertainty. This section provides that:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or

causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, • • • shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Six Justices voted to uphold this section on the ground hat as applied to the extreme facts in the case it was constitutional. The Court held that Screws was in no position o claim that the statute punished without warning an offense of which he was unaware.

The facts of the *Screws* case were as outrageous in its vay as the present appellant's reckless and flagrant disegard of the consequences of its acts are in this case. Screws, sheriff, with the aid of a policeman and a special leputy, arrested Hall, a United States citizen, on a warrant harging Hall with the theft of a tire. Enroute to the courtouse Sheriff Screws and his two accomplices commenced eating the handcuffed Hall with a black jack. They continued to beat him for almost half an hour after he had been nocked unconscious. He was then dragged through the ourthouse yard into the jail and left dying upon the floor.

The question raised by the *Screws* case was the same s that here under discussion, viz: whether the statute was oo vague and indefinite to provide an ascertainable standard f guilt when applied to a specific set of facts. This Court—ix Justices in substantial agreement as to the reasons—ejected the contention that the statute was unconstitutionally vague, indefinite and uncertain as applied to the acts of the *Screws* case on the ground that whatever are he rights secured by the Constitution—and in close cases his is a very difficult question—it is evident that one right ecured by the Constitution is the right not to be deprived of fe without a fair trial.

It was this right according to the prevailing Justices hat Sheriff Screws deprived Hall of, when he and his accomplices wilfully beat their prisoner to death. Thus Sec-

tion 20 of the Criminal Code was not indefinite, vague or uncertain when applied to the particular facts of the *Screws* case however vague it might be when applied to other facts. Similarly in the aggravated circumstances of the instant case whatever else the Interstate Commerce Commission regulation in question prohibited, it prohibited appellant from driving its vehicle through a crowded and vulnerable Tunnel at the peak hour of morning commuter congestion when other routes were available which in any sense of the word were practicable for appellant to use. As a result of appellant's knowing violation of this section, sixty persons were injured, and tremendous property damage occasioned. Even this does not tell the full story for the toll of the catastrophe was surprisingly though fortunately low. A recurrence could cause great loss of life and far greater loss of property. Whether the regulation in question might be held vague and indefinite in close cases it is certainly not indefinite as applied to an extreme case like the present one.

We recognize quite frankly that two of the present members of this Court were unable to concur with the majority in upholding the constitutionality of the statute challenged in the *Screws* case. The reasons which impelled their opinion do not, however, apply to the present case. The argument in this Point merely suggested additional reasons for upholding the regulation. The precedent value of the *Sproles* case remains. The clear meaning of the words in the present statute as words of ordinary usage as well as of judicial construction remains. And the doctrine remains that a statute is not invalid because of the possibility of individual differences of opinion as to whether specific conduct violates a prohibition. Furthermore, there is not in the present case the alternative recognized by the dissenting Justices in the *Screws* case—the acts there constituted manslaughter or murder under state law and were punishable as such. The Justices suggested that prosecution under the federal statute involved was an abnormal substitution of federal punishment for the normal state

process which would unbalance the relationships between state and nation. In the present case, however, we are in the field of regulation of interstate commerce in its most elementary sense. For Congress to seek to protect the free flow of that commerce from physical interference and to protect life and limb from the consequences of such commerce is the exercise of one of the most elementary powers delegated to the Federal Government in the Constitution. The philosophy of both the prevailing and dissenting Justices in the *Screws* case would call, we respectfully submit, for upholding the regulation and the indictment challenged herein.

If, as the Court held in the *Screws* case, the constitutionality of the challenged statute was aided because it only punished action "willfully" designed to deprive a person of his rights under the Constitution and laws of the United States (325 U. S. at p. 101) then we point out that in the present case the statute pursuant to which the Interstate Commerce Commission issued the regulation in question punishes only violations "knowingly" made. The word "knowingly" found in the instant statute performs the same function in the instant case that the word "willfully" played in the *Screws* case. See also *Omaechevarria* v. *Idaho*, 246 U. S. 343 (1918); *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497 (1925).

It is essential to both the protection of life, the safety of interstate commerce and the prosperity and defense of the nation that the Interstate Commerce Commission have the sanction of the criminal code behind its safety regulations on transporting inflammables. The nature of the Port Authority's underwater crossings and the density of their traffic justifies, even necessitates, the strongest and most rigid precautionary measures. Flexible regulations based upon a rule of reason are the only type of regulation which are at once practicable enough to obviate the dangers described above and yet definite enough to afford an ascertainable standard of guilt. Just such a regulation is the one here attacked when applied to the facts detailed in Counts One, Three and Five of the Indictment.

V

The regulation is entitled to the well-established presumption of constitutionality—to do otherwise would unnecessarily thwart a clear and important congressional purpose. The regulation can and should be interpreted so as to render it constitutional.

In empowering the Interstate Commerce Commission to promulgate regulations, Congress was motivated by concern for safety in the transportation of hazardous cargo in interstate commerce. The regulation in question is predicated upon such an authorization and is designed to effectuate Congressional intent. As such it enjoys a presumption of constitutionality which appellant has not rebutted. *Boske* v. *Comingore*, 177 U. S. 459 (1900).

The issue there was the validity of a regulation promulgated by the Secretary of the Treasury pursuant to statutory authorization. A unanimous Court observed (p. 470):

> "In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under § 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress."

Not only is the regulation in question entitled to the normal presumption of constitutionality afforded statutes but it is also entitled to receive the benefits from the corollary of that presumption, namely that if two interpreta-

tions of the regulation are possible, one rendering it unconstitutional and the other upholding its constitutionality, the latter will invariably be chosen. For example, Mr. Justice Holmes in *United States* v. *Jin Fuey Moy*, 241 U. S. 394 (1916) observed when discussing the validity of a criminal indictment predicated upon the alleged violation of a federal statute (p. 401):

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

The Court has invariably favored that construction of legislation which supports its constitutionality. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936); *National Labor Relations Bd.* v. *Jones & L. Steel Corp.*, 301 U. S. 1, 30 (1937); *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351 (1937).

In the *Screws* case it was stated that this construction (p. 98)

> "is impelling here so that if at all possible § 20 may be allowed to serve its great purpose—the protection of the individual in his civil liberties."

The purpose of the Interstate Commerce Commission regulation in question is also important—the protection of life, limb and property on the highways of the nation so as not only to insure their safety but also to facilitate the free flow of commerce between the states.

The Court further stated (p. 100):

> "Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result."

Chief Judge Cardozo makes the same point in *People* v. *Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931), when he stated in reference to the validity of a criminal statute (p. 472):

> "Where two meanings are reasonable, the preference is given to the one that sustains a statute rather than to the one that overturns it."

A dramatic application of this principle occurred in *People* v. *Grogan*, 260 N. Y. 138, 183 N. E. 273 (1932) in which the Court upheld the constitutionality of a criminal prohibition against driving a motor vehicle so as to "unnecessarily interfere" with or "unnecessarily endanger" highway traffic. The Court could find no well-established meaning for the word "unnecessarily" in the context but nevertheless upheld the provisions by reinterpreting their language to provide an acceptable criterion. The Court said (p. 149):

> "Therefore, in order to render these two provisions of section 58 of the Vehicle and Traffic Law constitutional and provide for them a standard or measure of conduct, we must read the words 'unnecessarily interferes' or 'unnecessarily endangers' as 'unreasonably interferes' or 'unreasonably endangers,' which means 'interferes with or endangers the user of the highway through the failure to exercise reasonable care, reasonable caution or the reasonable foresight of a reasonably prudent and careful person.'"

Much less interpretation is required to uphold the regulation challenged herein. The District Court, in holding the instant regulation invalid in this case, for failing to afford an ascertainable standard of guilt, underestimated its capabilities when it said (90 F. Supp. at p. 999):

> "We are fully aware that the disaster which led to the present prosecution emphasized the need for adequate regulations, but it is not within our power to make them."

But it was not necessary in order to minimize the likelihood of the repetition of the Holland Tunnel disaster of which the Court was aware, that it make adequate regulations; it needed only to apply the interpretation of the existing regulation so as to accord it the normal presumption of constitutionality.

Apropos of this situation is the language of Chief Judge Cardozo, in *People* v. *Mancuso*, 255 N. Y. 463, 175 N. E. 177 (1931), when he said (p. 470):

> "The power existing, one is at a loss to imagine how the prohibited omissions could be more accurately stated, without a catalogue of particulars not susceptible of enumeration in advance of the event."

An adverse ruling from this Court would prevent the Interstate Commerce Commission from effectuating its clear Congressional mandate of prescribing and enforcing rules designed to insure the free and safe flow of interstate commerce, for a decision which would invalidate this regulation would also prevent the enforcement of any other. It is evident that the Interstate Commerce Commission cannot detail the specific routes throughout the United States that shall be used by carriers transporting dangerous cargo. In view of this, Chief Judge Cardozo's thought is compelling. Is it reasonable to suggest that whereas packaging, labeling, storing and handling may be regulated, this Court should confess that the transportation itself is beyond regulation?

Here two possible interpretations of the regulation are available: The first would be derived from judicial decisions interpreting analogous language and make criminal and unreasonable failure to recognize and select a commercially practicable route when such will enable a carrier of dangerous cargo to avoid a congested tunnel. The second interpretation, or rather the lack of one, would result in a throwing up of the hands acknowledging a failure to find meaning in the challenged language. Faced with these choices, of which the first yields a constitutional provision carrying out a clear and important Congressional purpose and the second strikes down such purpose on constitutional grounds, the first must be adopted.

Conclusion

Wherefore, we join in the Government's prayer that the decision of the Court of Appeals for the Third Circuit in sustaining Counts One, Three and Five of the Indictment be affirmed.

Respectfully submitted,

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